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DECISIONS OF THE
COURT OF APPEAL
ON APPEAL FROM THE
CHANCERY DIVISION
AND
CASES IN LUNACY.

IN RE FREME, FREME *v.* LOGAN.

1893, October 25. LINDLEY, A. L. SMITH, AND DAVEY, L.JJ.

Settled Land—"Settled Estate"—Sale of Portion—Application of Proceeds in Extinguishment of Incumbrances on Other Portion—Failure of Contingent Remainders—Settled Land Act, 1882 (45 & 46 Vict. c. 38), ss. 2, 21, 22, sub-s. 5.

A testator by will devised his W. estate, his S. estate, and his R. estate to A. for life, with remainder to such of his children as should attain twenty-one. At the date of the testator's death the R. estate and part of the W. estate were mortgaged. A., as tenant for life, sold a portion of the S. estate, and the proceeds were applied towards the discharge of the incumbrances on the W. and R. estates. In the events which happened the contingent remainders failed as to the S. estate and the unincumbered portion of the W. estate:—

Held, that, though owing to the failure of the contingent remainders the three estates did not, in the event, devolve in the same way, yet they constituted only one settled estate under one settlement; and that, accordingly, the proceeds of sale of the portion of the S. estate were properly applied in discharge of the incumbrances on the W. and R. estates.

APPEAL from a decision of North, J.

William Freme, by his will, dated 27 February, 1877, devised his freehold estate known as the Wepre Hall Estate; his farm and lands known as the Shotton Hall Estate; and his house property in Renshaw Street, Liverpool, to his son, James Freme (the father of the plaintiffs), for life, and from and after his decease unto all

The children of his son James as he should by deed or will appoint, and in default of any such appointment "unto and amongst all the children of my said son James who, being a son, shall attain the age of twenty-one years, or, being a daughter, shall attain that age or marry, equally between them." The testator devised and bequeathed his residuary real and personal estate to James Freme.

The testator died on 10 September, 1878. At the time of his death part of the Wepre Hall Estate was subject to a mortgage for 17,004*l.* 2*s.* 7*d.*, and was freehold; the remainder was freehold and unincumbered. The Shotton Hall Estate was freehold and unincumbered. The Renshaw Street property was partly freehold and partly leasehold, and was subject to a mortgage for 3,000*l.* and a further charge for 1,253*l.* 11*s.* 6*d.*, which last-mentioned sum was further secured upon other freehold property of the testator in Crosshall Street, Liverpool.

By an order of the Court of 4 June, 1886, the defendants Davison and Clement were appointed trustees of the settlement created by the testator's will for the purposes of the Settled Land Act, 1882.

In the year 1887 part of the Shotton Hall Estate was sold by James Freme under the powers of the Settled Land Act, 1882, as tenant for life for the sum of 12,196*l.* 17*s.* 6*d.*, of which sum 3,626*l.* 15*s.* 9*d.* was applied by the trustees in discharge of the mortgage for 3,000*l.*, and of a proportion of the charge for 1,253*l.* 11*s.* 6*d.* on the Renshaw Street property, and 8,500*l.* was applied in part discharge of the mortgage on the Wepre Hall Estate, the 70*l.* 1*s.* 9*d.* balance remaining in the trustee's hands. The freehold portion of the Renshaw Street property was reconveyed to James Freme by an indenture of 24 March, 1887, to the uses of the will of the testator, and the leasehold portion to the defendant Logan, the trustee of the will. A new lease of the leasehold portion was granted in consideration of a fine paid by James Freme.

James Freme died on 21 April, 1888, intestate and a widower, and without having exercised the power of appointment given him by the testator's will. He left three children him surviving, all of whom were infants at the date of his death—viz. the defendant,

John Freme, his heir-at-law, and the plaintiffs, Thomas Freme and Sidney Freme.

The present action was commenced by the two younger children of James Freme, by their next friend, against the trustee of the testator's will, the eldest son and heir-at-law of James Freme, the trustees of the settlement for the purposes of the Settled Land Act, and one Gardner, who was one of the executors appointed by the testator, to determine the rights of all persons interested in the testator's real and personal estates under his will; administration, so far as necessary, of his estate; rectification, so far as necessary, of instruments executed by, or by direction of, James Freme; and an account of moneys received by the settlement trustees.

By an order of NORTH, J., dated 5 June, 1891,* it was declared that the contingent remainders limited by the will of the testator expectant on the decease of James Freme had failed so far as they related to that part of the Wepre Hall Estate which had not been subject to the mortgage for 17,004*l.* 2*s.* 7*d.*, and also so far as they related to the Shotton Hall Estate; but valid so far as they related to the part of the Wepre Hall Estate which had been subject to the mortgage for 17,004*l.* 2*s.* 7*d.*, and also so far as they related to such part of the Renshaw Street property as was freehold. And it was further declared that so much of the sum of 12,196*l.* 17*s.* 6*d.* (the proceeds of sale of such portion of the Shotton Hall Estate as was sold) as had been applied in payment of incumbrances on the Renshaw Street property and the portion of the Wepre Hall Estate which had been subject to mortgage had been properly applied in extinguishment of the incumbrance upon the Renshaw Street property, and in extinguishment, *pro tanto*, of the incumbrance upon the portion of the Wepre Hall Estate which had been subject to mortgage.

From that order the infant heir-at-law of James Freme, by his guardian *ad litem*, appealed, so far as it declared that the proceeds of sale, so far as they had been applied in extinguishment of the mortgages, had been properly so applied; and he asked instead that it might be declared that he was absolutely entitled to the sums of 3,626*l.* 15*s.* 9*d.* and 8,500*l.* (the parts of the sum of 12,196*l.* 17*s.* 6*d.* which had been so applied), and that he was

* [1891] 3 Ch. 167; 60 L. J. Ch. 562; 65 L. T. 183; 39 W. R. 696.

entitled to a charge upon the Renshaw Street property and the portions of the Wepre Hall property subject to mortgage in respect of such sums respectively, with interest thereon from the death of James Freme.

Cozens-Hardy, Q.C., and *R. N. Arkle*, for the appellant :

Here there are two distinct settlements. In the events which have happened the properties settled by the testator's will have gone different ways, though the limitations were one and the same ; the fact that the two settlements are included in one devise does not make them one settlement, and money arising from one settled property cannot be applied in paying off incumbrances on the other. [They referred to *In re Mundy's Settled Estates* (1), *In re Byng's Settled Estates* (2), and the definition of "settlement" in section 2, sub-section 1 of the Settled Land Act, 1882.] Anything which James Freme did, or anything which the trustees did by his direction, whether the sale of part of the property or the application of the proceeds, could not alter the rights of the parties entitled ; that is expressly provided for by sub-section 5 of section 22. In what he did, James Freme was acting merely as tenant for life ; he was not, and never was, absolute owner, so as to be in a position to say what should be done with the proceeds of sale of the Shotton Hall property, although in the particular events that have happened that property, if it had not been sold, would have come to his heir-at-law ; at the time when it might be said he could have elected to convert the money from land into personalty it might have been answered that he was not absolute owner : *Sisson v. Giles* (3). The proceeds of the sale are, in effect, realty, and the appellant is entitled to the money.

S. Hall, Q.C., and *E. S. Ford*, for the respondents, the two younger infants :

This is all one settlement, and the proceeds of part of the settled property, which was properly and *bonâ fide* sold, were properly applied in the discharge of incumbrances on other parts of the

(1) [1891] 1 Ch. 399 ; 63 L. T. 311 ; 39 W. R. 209.

(2) [1892] 2 Ch. 219 ; 61 L. J. Ch. 511 ; 66 L. T. 754 ; 40 W. R. 457.

(3) 3 De G. J. & S. 614 ; 32 L. J. Ch. 606 ; 8 L. T. 780 ; 11 W. R. 558.

settled estate: *In re Marlborough's (Duke) Settlement* (4). James Freme, who did that which is now in question, could not have come to the Court afterwards and said, "I have done wrong in applying the money as I did, I am entitled to have the money back;" no more, then, can his heir-at-law come in and claim what he could not have claimed.

Cozens-Hardy, Q.C., replied.

LINDLEY, L.J.: In this case I think the decision arrived at by Mr. Justice NORTH is correct. The case is a little peculiar. We start with a will of a testator who gives certain properties called Wepre Hall and Shotton Hall, and some houses in Renshaw Street, Liverpool, to his son James for life, and then amongst James' children as James should by deed or will appoint, and, in default of appointment, to those children who should attain twenty-one. There is in the same will a residuary devise in favour of James in fee.

Now, stopping there for a moment, it appears to me, when you look at the Settled Land Act, 1882, this Wepre Hall Estate, and the Shotton Hall Estate, and the other property specifically referred to, form one settled estate subject to one settlement—namely, the will. I cannot read that will as amounting, by reason of some events which have happened, to several settlements of several properties. It is one settlement of one settled estate. It so happens that, by reason of the position of the legal estate, there has been, as to one of these properties, a failure in giving effect to the contingent remainders contained in the will, so that one portion of the land which was intended to go to the children at twenty-one falls into the residue by reason of the contingent remainder having failed; so that, in point of fact, a portion of this land does not go as the testator intended and supposed it would go. That is a circumstance which is peculiar in this case; but before anything of that sort had occurred, and whilst James Freme was tenant for life, one portion of the property—namely, Shotton Hall Estate—was sold, and the proceeds were applied in paying off a mortgage on another part of the property. It is true that the mortgage was held by a person named Logan in trust for Freme, and so he got the money, but he

(4) 32 Ch. D. 1; 55 L. J. Ch. 339; 54 L. T. 914; 34 W. R. 377.

(LINDLEY, L.J.)

got the money as mortgagee, and not as owner of the estate that was sold. The instrument by which that was done is before us, and the recital shows plainly, I think, that those parties intended to do that which they supposed the Settled Land Act, 1882, authorized; and it appears to me that when you look at the will and at the terms of the Settled Land Act they were right in supposing that the Act did authorize it, and what they did was to apply the money in paying off and extinguishing the mortgage. That seems to me to be right. I base my decision upon that rather than upon the more complicated arguments adopted by Mr. Justice NORTH. The result is the same either way. I prefer to adopt the argument put forward by the respondents' counsel, which I think is well founded and simpler. The appeal must be dismissed.

A. L. SMITH, L.J.: In this case I am of opinion that the decision of Mr. Justice NORTH is correct. The view I take is this: I read the will of the testator as one settlement of one settled estate, so that one settled estate consisted of land of so many acres. It so happens that by reason of some events which have since taken place, all the land does not follow the same devolution, but, in my judgment, that does not make this the less one settlement of one settled estate. Having arrived at that conclusion, the question is whether what has been done was done within the meaning of the Settled Land Act. The heir-at-law asked Mr. Justice NORTH for a charge upon the estates other than the Shotton Hall Estate; and he asks this Court to make up the loss which he has sustained by reason of a portion of the Shotton Hall Estate having been sold. What does the Settled Land Act, 1882, say? Section 21 says: "Capital money arising under this Act, subject to payment of claims properly payable thereout, and to application thereof for any special authorized object for which the same was raised, shall, when received, be invested or otherwise applied wholly in one, or partly in one and partly in another or others, of the following modes (namely)" by sub-section ii. "In discharge, purchase, or redemption of incumbrances affecting the inheritance of the settled land" That is what has been done in this case. Assuming that I am right in my premise that there is one settled estate, the

sale money has been properly applied. I turn to section 2 to see what the meaning of settled land is, and it seems to me clear that down to that point the decision this Court is now arriving at is correct.

But then we have our attention called to section 22. Counsel on behalf of the appellant say that that section, and sub-section 5 in particular, shows that this money was in effect land, because it is there said that capital money arising under this Act, while remaining uninvested or unapplied, shall be considered as land. Now I wish to point out that that sub-section was necessary. If you read section 21 it only applies to what shall be done with capital money—namely, be invested. What is to happen when the money is received by the trustees and is not invested? You wanted sub-section 5 to say what should be the nature of that money while it remained in the hands of the trustees uninvested in the manner prescribed by section 21. Therefore it seems to me that sub-section 5 of section 22 must have the construction I put upon it.

DAVEY, L.J.: I agree with my learned brethren that this order must be affirmed, and I think that, when the question is understood, it turns really upon the construction of very few sections in the Settled Land Act, 1882. The most important section is the one which has been already referred to relating to the mode in which capital money arising from the sale of settled land may be applied. It may be applied in discharge of incumbrances, or in purchase or redemption of incumbrances affecting the settled land. Now the question is, What is the settled land in this case? Lord Justice LINDLEY asked the learned counsel who argued for the appellant whether he said that the application of money in payment off of an incumbrance—that is to say, of money arising from a sale—was right or wrong; and he was constrained to say that it was wrong, and he said it was wrong because the land affected by the incumbrance which was paid off or discharged was not part of the settled land; and therefore the question on that is whether it was part of the settled land. In my opinion it was part of the settled land. It appears to me to be a fallacy to say that there is more than one settlement. There is one settlement, it may be of many properties, all given by the same instrument and in the same

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identical words, and to say that that is not one settlement seems to me to be an entire fallacy.

Then it is said not to be one settlement because, owing to the fact of the technical rules relating to contingent remainders, part of it would go in the events which have happened in one way and part in another ; but that does not seem to me in any way to affect the settlement created by the will or to make it otherwise than one settlement for the purposes of the Settled Land Act, 1882. The argument for the respondent seems to me unanswerable. What was done was perfectly right. It was within the power of the tenant for life, and he could only be attacked in the way in which the acts of a tenant for life are sometimes attacked, by saying that he had committed a breach of trust, or saying that he did not have due regard to the interests of all the persons interested under the settlement. Any case of that kind could not have been made by himself, and the person whom we have now before us complaining of the act of the tenant for life is himself in the position of the tenant for life. He is the heir-at-law of the tenant for life, and he can stand in no better position than the tenant for life would stand if he were now before us. I think, if this view were not sound, and the view of the learned counsel for the appellant were sound—if the money was not duly applied by the tenant for life, and the incumbrance paid off was not an incumbrance affecting the settled land—even if that were so, to my mind the result would be the same, because then it would be a breach of trust for which the tenant for life himself would be responsible, and neither he nor anyone else claiming under him as a volunteer could be heard to complain of the act of the tenant for life himself. I prefer, with the other members of the Court, to put my decision upon the ground that the application was a right application. If so, there is an end of the matter, because it cannot be denied that it was not an investment. What the Act speaks of is an application in discharge of incumbrances, and not an investment effected on a transfer of incumbrances. There cannot be any doubt of the intention of the parties, or that the intention was to extinguish the incumbrances for all purposes, and I cannot see anything shocking in that. The tenant for life may very well have thought that it was for the benefit of all the family that those incumbrances should

be paid off and that the estate should be put in funds by that sale. On these grounds I think the judgment of the Court below should be affirmed.

Appeal dismissed.

Solicitors: *Field, Roscoe & Co.*, for the Appellant.

Patersons, Snow, Bloxam & Kinder, for *Peele & Peele*,
Shrewsbury, for the Respondents.

BAILEY v. BARNES.

1893, Aug. 1, 2, 7, 8; Oct. 30. LINDLEY, LOPES, AND A. L. SMITH, L.JJ.

Vendor and Purchaser—Constructive Notice—Successive Equitable Incumbrancers—Prior Equities—Purchaser getting in Legal Estate after Notice—Tacking—Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 21, sub-s. 2—Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 3, sub-s. 1.

By section 3, sub-section 1 of the Conveyancing Act, 1882, a purchaser shall not be prejudicially affected by notice of any instrument . . . unless . . . it would have come to the knowledge of his solicitor . . . if such inquiries and inspections had been made as ought reasonably to have been made:—

Held, that the expression “ought reasonably” means ought as a matter of prudence, having regard to what is usually done by prudent men of business in similar circumstances.

Doctrine as to constructive notice in *Ware v. Egmont* (1) approved.

The doctrine that where equities are equal the legal title prevails is not confined to tacking mortgages, but applies in favour of all equitable owners or incumbrancers for value without notice of prior equitable interests, who get in the legal estate from persons who commit no breach of trust in parting with it to them.

Brace v. Marlborough (Duchess) (2) followed.

APPEAL from a decision of Stirling, J.

In 1888 four houses in Putney belonging to Johnson were mortgaged for 1,500*l.* each—*i.e.* 6,000*l.* altogether. In February, 1889, the plaintiff, who was a judgment creditor of Johnson, obtained the appointment of a receiver of the rents and profits of the houses by way of equitable execution subject to the rights of the mortgagees, and thus obtained a charge on the equity of redemption in the premises. On 21 December, 1889, the mortgagees transferred their

(1) 4 De G. M. & G. 460; 24 L. J. Ch. 361; 3 W. R. 48.

(2) 2 P. Wms. 491; Mos. 50; 2 Eq. Cas. Ab. 614.

mortgages to Barnes, and on the next day Barnes conveyed the houses to Midgley for the exact sum which he had himself paid to the mortgagees—viz. 6,816*l.* 5*s.* 8*d.* altogether ; Barnes purported to convey under the powers of sale contained in the original mortgages. On the face of the documents there was nothing, except that Midgley paid Barnes the same sum that Barnes had paid the mortgagees, to show that anything was wrong in this transfer and sale ; and if the sale to Midgley had been valid he would have acquired a good title both as against Johnson and as against the plaintiff, Johnson's incumbrancer. On 4 March, 1890, Midgley mortgaged the houses for 6,000*l.*, and the mortgagees had the legal estate conveyed to them in the usual way. Midgley died in May, 1890. On 29 July, 1890, Lilley agreed to buy the property from Midgley's executors and devisees for 2,500*l.*, subject to the prior mortgage for 6,000*l.* On 13 August a conveyance was executed by Midgley's representatives to Lilley, and he paid the 2,500*l.* purchase-money to Midgley's representatives. Lilley thus, in effect, bought the property for 8,500*l.*, although he knew that Midgley had only given 6,862*l.* 13*s.* 5*d.* for it in the previous December. In July, 1890, Lilley had been shown a valuation made in January, 1890, for the purposes of the mortgage, and according to this valuation the value of the property was somewhat speculative, but was estimated at 8,700*l.* As early as March, 1890, the plaintiff Bailey suspected that the sale by Barnes to Midgley was not a *bonâ fide* sale ; and on 15 August, 1890, a writ was issued by Bailey against Barnes, Johnson, and Midgley's executors and devisees, to set aside the sale by Barnes to Midgley and to redeem the property, on the footing that Midgley was only entitled to be treated as a mortgagee. Lilley, of whom the plaintiff knew nothing, was not a party to those proceedings. In June, 1891, however, Lilley heard of them, or, at all events, had notice that the sale by Barnes to Midgley was questioned. In March, 1892, the sale was declared invalid, and the plaintiff was held entitled to redeem ; and in November, 1892, this decision was affirmed on appeal. In February, 1893, a receiver was appointed. In March, 1893, Lilley applied to discharge this receiver. At this time the legal estate was in Midgley's mortgagees ; but in April, 1893, Lilley paid them off and acquired the legal estate. On 16 May, 1893, Lilley's summons came on before

STIRLING, J., and the parties agreed to waive all technical objections and to submit to the Court, on the merits, the question whether the plaintiff's charge was available against Lilley as purchaser.

STIRLING, J., decided this question in the negative upon the following grounds: (i.) That when Lilley agreed to buy the property in July, 1890, and when he paid the 2,500*l.* to the vendor, he (Lilley) acted perfectly *bonâ fide*, and without any actual notice of the invalidity of the sale by Barnes to Midgley; (ii.) that Lilley had no constructive notice of such invalidity at those times; (iii.) that although he had notice of such invalidity in June, 1891, he was entitled to protect himself by acquiring the legal estate, which he ultimately did; and (iv.) that under these circumstances he was protected by section 21, sub-section 2 of the Conveyancing Act, 1881, and section 3 of the Conveyancing Act, 1882.

From this decision the plaintiff appealed.

Fischer, Q.C., and Archibald Brown, for the appellant:

Lilley must be taken, when he purchased the property in 1890, to have had constructive notice of the invalidity of the sale by Barnes to Midgley. It appeared on the face of the documents that Barnes sold the property to Midgley the day after he (Barnes) had obtained a transfer from the mortgagees of their mortgage for the exact sum that he had paid the mortgagees. Under these circumstances Lilley or his solicitors were bound to make inquiries as to the nature of that sale, and if they had done so they would have discovered that the sale was fraudulent and invalid. Lilley is, therefore, not protected by section 3, sub-section 1 (3) of the Conveyancing Act, 1882, or section 21, sub-section 2 of the Act of 1881. The valuation shown to Lilley on the occasion of his purchase showed that

(3) Section 3, sub-section 1 of the Conveyancing Act, 1882, provides: "A purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing unless (i.) it is within his own knowledge or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him; or (ii.) in the same transaction with

respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel as such, or of his solicitor or other agent as such, or would have come to the knowledge of his solicitor or other agent as such if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent."

the property had been sold by Barnes to Midgley at an under-value.

[They referred to *Farrar v. Farrar's (Limited)* (4), *Toulmin v. Steere* (5), *Peacock v. Burt* (6), *Le Neve v. Le Neve* (7), *Ware v. Egmont* (1), and *Pearson v. Benson* (8).]

T. R. Warrington, for Lilley.

Ashton Cross, for Midgley's executors and devisees.

Cur. adv. vult.

October 30.

The judgment of the Court was now delivered by

LINDLEY, L.J.: [His Lordship stated the facts above set out, and proceeded:] *Bona fides* on the part of Lilley, and the absence of actual notice by him of anything wrong, were found as facts by Mr. Justice STIRLING, before whom Lilley was examined and cross-examined, and we accept his conclusion on these points. The appeal, then, really turns on whether, in July and August, 1890, Lilley is to be treated as having had constructive notice of the invalidity of Midgley's title, and on the effect of acquiring the legal estate in April, 1893. This is one of those cases in which there is danger of referring knowledge of facts now known to a time anterior to their discovery; danger of falling into the error attributed to those who are wise after the event. The plaintiff's case against Lilley rests on the notice, if any, which he (Lilley) had in August, 1890, when he bought the equity of redemption in the property for 2,500*l.* No doubt, if he had been a suspicious or unwilling purchaser, he would very likely have made inquiries which would have induced him not to complete his purchase. But he was not suspicious, in fact, and he did not make such inquiries as a suspicious man would, in fact, have made. It would be going too far, however, to affect him with constructive notice of the invalidity of Barnes' sale. The doctrine of constructive notice is based on good sense, and is designed to

(4) 40 Ch. D. 395; 58 L. J. Ch. 185; 60 L. T. 121; 37 W. R. 196.

(5) 3 Mer. 210.

(6) 4 L. J. Ch. 33.

(7) Amb. 436; 2 W. & Tud. L. C. 26.

(8) 28 Beav. 598.

prevent frauds on owners of property; but the doctrine must not be carried to such an extent as to defeat honest purchasers, and, although this limitation has sometimes been lost sight of, still the limitation is as important and is as well known as the doctrine itself. This will be seen both from well-known decisions and from the language of the Conveyancing Act, 1882, s. 3, which is now the authority to be regarded. In *Ware v. Egmont* (1) Lord CRANWORTH stated the law on the subject in language which has always been accepted as correct: "The question, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining, and might by prudent caution have obtained, the knowledge in question, but whether the not obtaining it was an act of gross or culpable negligence. It is obvious that no definite rule as to what will amount to gross or culpable negligence, so as to meet every case, can possibly be laid down." Gross and culpable negligence in this passage does not import any breach of legal duty, for a purchaser of property is under no legal obligation to investigate his vendor's title. But in dealing with real property, as in other matters of business, regard is had to the usual course of business, and a purchaser who wilfully departs from it in order to avoid acquiring a knowledge of his vendor's title is not allowed to derive any advantage from his wilful ignorance of defects which would have come to his knowledge if he had transacted his business in the ordinary way. In the celebrated judgment of Vice-Chancellor WIGRAM, in *Jones v. Smith* (9), the cases of constructive notice are reduced to two classes: the first comprises cases in which a purchaser has actual notice of some defect, inquiry into which would disclose others; and the second comprises cases in which a purchaser has purposely abstained from making inquiries for fear he should discover something wrong.

The Conveyancing Act, 1882, s. 3, sub-s. 1, usually does no more than state the law as it was before, but its negative form shows that a restriction, rather than an extension, of the doctrine of notice was intended by the Legislature. [His Lordship read the sub-section, and continued:] Can we say that Lilley or his solicitor "ought reasonably" to have made inquiries into the validity of the sale by Barnes? The word "ought" there does not import a duty

(9) 1 Hare, 43.

or obligation, for the purchaser need make no inquiry. The expression "ought reasonably" must mean, "ought as a matter of prudence," having regard to what is usually done by prudent men of business in similar circumstances. Light is thrown on the meaning of "ought reasonably" by the Conveyancing Act, 1881, s. 21, sub-s. 2, which relieves purchasers from mortgagees purporting to sell under powers of sale from the necessity of inquiring into the propriety or the irregularity of the exercise of the power. It is easy to see now that Lilley's solicitors might have been more suspicious and more cautious; but we are not prepared to say that they ought to have been so when he bought in August, 1890; and unless we can go that length we cannot hold that Lilley then had notice of anything wrong. For these reasons we have come to the conclusion that in August, 1890, when Lilley bought the property subject to the mortgage for 6,000*l.*, he had no notice, actual or constructive, of any defect in his vendor's title.

The case, then, stands thus: The plaintiff had a judgment affecting Johnson's equity of redemption. Lilley had acquired by purchase for value an equitable interest in the same property from a person whose title apparently displaced Johnson's, and also, consequently, the plaintiff's judgment. Lilley had no notice of any defect in his own title, no notice that the plaintiff's judgment affected him. Lilley afterwards discovers that the plaintiff's judgment is not displaced, and in order to protect himself he pays off the 6,000*l.* mortgage and gets in the legal estate. The question is whether he can now hold the property free from the plaintiff's judgment. We are of opinion that he can. The maxim, *Qui prior est tempore, potior est jure*, is in the plaintiff's favour, and it seems strange that he should, without any default of his own, lose a security which he once possessed. But the above maxim is in our law subject to an important qualification, that where equities are equal the legal title prevails. Equality here does not mean or refer to priority in point of time, as is shown by the cases on tacking. Equality means the non-existence of any circumstance which affects the conduct of one of the rival claimants, and makes it less meritorious than that of the other. Equitable owners who are upon an equality in this respect may struggle for the legal estate, and he who obtains it, having got both law and equity on his side, is in a better situation

than he who has equity only. The reasoning is technical, and not satisfactory; but as long ago as 1728 the law was judicially declared to be well settled, and only alterable by Act of Parliament. See *Brace v. Marlborough (Duchess)* (2). It was contended that this doctrine was confined to tacking mortgages. But this is not so. The doctrine applies in favour of all equitable owners or incumbrancers for value without notice of prior equitable interests who get in the legal estate from persons who commit no breach of trust in parting with it to them. See *Saunders v. Dehew* (10) and *Pilcher v. Raulins* (11). It is true that the doctrine does not apply to an equitable owner or incumbrancer who gets in the legal estate from a trustee who commits a breach of trust in conveying it to him; at all events, if such a breach of trust is known to the person who gets in the estate, and, perhaps, even if he does not know of it. See *Carter v. Carter* (12) and *Mumford v. Stohwasser* (13). But the present case does not fall within this exception to or qualification of the general principle, for Lilley obtained the legal estate from a mortgagee whom he paid off, and who committed no breach of trust in conveying the legal estate to him. The fact that the legal estate was got in *pendente lite* is immaterial. See *Robinson v. Davison* (14) and *Bates v. Johnson* (15). The appeal must be dismissed.

Appeal dismissed.

Solicitors: *Jackson, Smart, Geake & Woodd; Lee & Pembertons; Chappell, Griffith & Broadbridge.*

(10) 2 Vern. 271.

(11) L. R. 7 Ch. 259; 41 L. J. Ch. 485; 25 L. T. 921; 20 W. R. 281.

(12) 3 Kay & J. 617; 27 L. J. Ch. 74.

(13) L. R. 18 Eq. 556; 43 L. J. Ch. 694; 30 L. T. 859; 22 W. R. 833.

(14) 1 Bro. C. C. 63.

(15) Johns. 304; 28 L. J. Ch. 509; 7 W. R. 512.

DE CARTERET v. LAND SECURITIES CO.

1898, November 1, 2, 8. LINDLEY, A. L. SMITH, AND DAVEY, L.JJ.

Discovery — Inspection — Postponement of Inspection — Question of Law to be Determined—R. S. C., 1883, Order XXV. r. 2; Order XXXI. r. 20.

The Court has jurisdiction, under Order XXV. r. 2, to make an order for an action to be set down for the determination of certain points of law, and can postpone inspection of documents under an order obtained therefor until after such points have been determined.

Semble, that Order XXXI. r. 20, is not to be construed so narrowly as to mean that the right to discovery or inspection is determined by the making of the common order, or that the Court is by the order for discovery or inspection made in the common form rendered powerless to make a subsequent order for questions of law to be determined before inspection.

APPEAL from a decision of Kekewich, J.

One Lever was at the date of the issue of the writ in the action a holder of one 50*l.* share in the defendant company, 10*l.* being paid up on such share. The company was incorporated under the Companies Act, 1862, on 22 December, 1863. Its business was (*inter alia*) to make advances of money repayable with interest upon the security of (*inter alia*) messuages, lands, hereditaments, and real property of all descriptions and tenures, and of all estates and interests therein. Its nominal capital was 2,000,000*l.*, in 40,000 shares of 50*l.* each, of which 20,000 had been issued, with 252,920*l.* paid up thereon.

On 29 July, 1891, Lever issued a writ against the company, in which he claimed an injunction to restrain the company and the directors thereof from paying any dividends on the shares in the company except out of the net profits of the company, and from applying any part of the assets of the company which represented capital in payment of dividends. The writ purported to be on behalf of Lever and all other the shareholders of the company. The statement of claim alleged (*inter alia*) that the company, in violation of its articles of association, had paid a dividend of two per cent. (amounting to 4,000*l.*) for the half-year ending 30 June, 1891, not out of the net profits, but out of the floating capital of the company, such floating capital being a sum of 70,565*l.* 5*s.* 8*d.*, which, according to the thirty-third annual balance-sheet of the company, made up to 30 June, 1891, represented the excess of assets over

liabilities of the company. It was further alleged that many of the securities of the company were worth less than the money advanced on them, and unrealizable except at a loss.

On 14 January, 1892, the defence was delivered, in which the company pleaded that the sum of 70,565*l.* 5*s.* 8*d.* represented the balance of undivided profit on 30 June, 1891, and that the 4,000*l.* paid thereout as a dividend was so paid pursuant to resolutions passed unanimously at the thirty-third general meeting of shareholders of the company held on 29 July, 1891, approving and adopting the report and accounts for the year ending 30 June, 1891. And the company pleaded that, under such circumstances, the action of the plaintiff was contrary to the wishes of the other shareholders.

On 22 January an order was made in the common form on the application of Lever for discovery and production of documents by the company. On 16 February the company took out a summons for further security to be given by Lever for costs of discovery. The summons was adjourned for Lever to answer the affidavit in support. On 22 February a receiving order was made against Lever, and on 16 March he was adjudicated a bankrupt. One De Carteret was appointed trustee in the bankruptcy, and on 3 November an order was made that the action should be carried on by the trustee.

In July, 1892, De Carteret, having been entered on the register of shareholders of the company as trustee in the bankruptcy of Lever in respect of Lever's one share, received a copy of the report and balance-sheet of the company for the year ending 30 June, 1892, and also received a dividend as recommended in the report, amounting to 4*s.*

On 10 February, 1893, upon the application of the company, an order was made limiting the discovery ordered by the order of 22 January, 1892. The company made an affidavit of documents in accordance with the order so limiting the discovery, but even under such limitation the number of documents discovered was so large as that the examination of them would involve enormous expense.

On 8 June, 1893, the company took out a summons in which it was submitted to the Court—(i.) whether, having regard to the receipt

by De Carteret as trustee of the bankrupt of the dividend paid by the company in July, 1892, the said De Carteret was not precluded and debarred from his right to the injunction sought and other relief in the action; and (ii.) whether Lever's cause of action (if any) devolved upon and was enforceable by the trustee in bankruptcy. And the company asked that all further discovery by them and all inspection of the documents disclosed might under Order XXXI. r. 20 be postponed until after the determination of the questions submitted.

KEKEWICH, J., considered that, so far as Order XXXI. r. 20 was concerned, the defendant company was precluded by the making of the common form order of discovery of 22 January, 1892, from afterwards raising the questions of law now submitted; that they ought to have been raised at the time of the application for discovery; and that Order XXXI. r. 20 did not point to any independent application at a future time; but his Lordship was of opinion that the enormous expense of examining the documents discovered ought not to be incurred if it could be avoided, and that he ought to restrict the litigation, which he regarded as dishonest, if he had jurisdiction to do so; and he held that the Court had such jurisdiction to do so outside the Orders and Rules. The following order was made: "This Court doth order that this action be forthwith set down by the defendants for the determination of the following question—namely, Whether upon the pleadings as they now stand, and having regard to the receipt in 1892 of a dividend by William Henry de Carteret, the trustee in bankruptcy of Ashton Lever, the plaintiff, William Henry de Carteret, is entitled to any, and what, part of the relief claimed in this action, and it is ordered that the inspection authorized by the said order dated 22 January, 1892, be postponed until the above question is determined."

The trustee appealed.

Lincoln Reed, for the appellant:

The company is too late. If they wished to postpone discovery and inspection, and to raise a point of law they ought to have applied to do so before the order for discovery and inspection was made. Order XXXI. r. 20 does not give the Court the power

suggested. If that be so, there was no inherent jurisdiction in the Court to make the order appealed from.

Warmington, Q.C., and A. W. Rowden, for the respondent company:

The order was in substance right, and was authorized by the practice of the Court. If we had included the points now raised in our pleadings we should have been within Order XXV. r. 2. The Court has ample jurisdiction under the Orders and Rules, in the interests of justice, to order any such question to be tried.

Reed, in reply.

The COURT directed the case to stand over for a week, the defendants in the meantime to amend their defence as they might be advised, so as to be in a position to avail themselves of Order XXV. r. 2.

The defence was accordingly amended.

November 8.

LINDLEY, L.J.: This is an appeal from an order made by Mr. Justice KEKEWICH, which runs thus: [His Lordship read the order, and continued:] The circumstances which have given rise to the controversy are these: One Lever commenced an action against this company upon the ground that they had been paying dividends out of capital. He became bankrupt, and De Carteret is his trustee in bankruptcy, and the action is being continued by him. The question whether the plaintiff is entitled to any relief or not depends, of course, upon the facts which may be proved, and upon the application of the doctrine of *Foss v. Harbottle* (1) to those facts. Whether the action will succeed or not I do not know. One very important and material question is whether upon the pleadings and upon the admissions, and now upon the amended defence, this case is within *Foss v. Harbottle* (1) or not. That is the real question which the defendants desire to raise at once, and I think they are entitled to raise that question.

(1) 2 Hare, 461.

(LINDLEY, L.J.)

Now what is the difficulty? The difficulty arises in this way. In January, 1892, the common order was made for an affidavit of documents and for discovery. That order has not been appealed against. I think myself that that was perhaps an oversight, and at all events has led to trouble, because if it had been discovered that there was so much difficulty, not to say oppression, in complying with that order, and an application had been made to extend the time to appeal from it, and for a special order to be made, I think probably that application would have succeeded, and the whole of this difficulty would have been avoided. But, for reasons which I do not know, that course was not pursued, and the plaintiff therefore naturally insists on the order of January, 1892, and what he asks for is that under the stress of the order he may be allowed to inspect all such books and documents of the company as are scheduled and as he may think proper. I give him the credit of supposing that he will not do that maliciously and spitefully; but still, when you look at the schedule of documents, you can see that to send persons down into the office of this company with a roving commission like that is, to say the least, a very serious—and *prima facie* seems to me rather an oppressive—proceeding, and I do not wonder at any Judge struggling, if he can, to prevent it.

When the case came before us last week there was a difficulty in applying Order XXV. r. 2 to it, because there was no point of law raised by the pleadings, and we suggested that that should be done; the defence has been amended, and now the defendants are right in point of form for the purpose of asking the Court to apply the power which it has under Order XXV. r. 2, which I will read. It runs thus: "Any party shall be entitled to raise by his pleading any point of law, and any point so raised shall be disposed of by the Judge who tries the cause at or after the trial, provided that by consent of the parties or by order of the Court or a Judge on the application of either party the same may be set down for hearing and disposed of at any time before the trial." That is by consent or by an order. The object of that is to prevent unnecessary expense in any form or any shape. A question is suggested which one of the parties contends will put an end to the case. The Court thinks it may be so, and orders that question to be tried. The pleadings

being now right in point of form, I see no difficulty in making an order to that effect, and I think we must do it.

Whether the construction put upon Order XXXI. r. 20, by the learned Judge in the Court below is a little narrow or not, is a point by no means free from difficulty. That Rule runs thus: "If the party from whom discovery of any kind or inspection is sought objects to the same, or any part thereof, the Court or a Judge may, if satisfied that the right to discovery or inspection sought depends on the determination of any issue or question in dispute in the cause or matter, or that for any other reason it is desirable that any issue or question in dispute in the cause or matter should be determined before deciding upon the right to discovery or inspection, order that such issue or question be determined first, and reserve the question as to the discovery or inspection." It appears to me that it is rather a narrow construction of that Rule to say that the right to the discovery has been determined by the common order, and that the Court is powerless after that to make an order under this Rule. I am not at all prepared to hold offhand that the right to discovery does not mean there, the exercise of that right, and that if any application were made to delay the enforcement of that right this order might not be used for that purpose.

We come now to the practical question, What is to be done? It appears to me what we ought to do is this. We ought to vary the order and to give liberty to the company to raise the question of law—to vary the order made by Mr. Justice KEKEWICH, simply putting the language as to the issue now raised by the pleadings instead of the somewhat similar language which occurs in his order. I should propose that the order should be varied by putting it thus: This Court doth order that this action be forthwith set down by the defendants for the determination of the following question of law. Then set out the amended pleading. The rest of the order will then stand. The costs of this appeal ought to be reserved.

A. L. SMITH, L.J.: I am of the same opinion. I entirely agree with the endeavour which Mr. Justice KEKEWICH has made, if possible, to stop this inspection until it is distinctly ascertained whether it is absolutely necessary or not for the plaintiff's case. He took that step, and we need not decide as to whether or not he

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had jurisdiction to take that step under the Rules, nor have we to decide to-day what is the true construction of Order XXXI. r. 20, because at the suggestion of the Court there has been an addition to the defence which clearly brings this case now within Order XXV. r. 2; and everything being in order, the Court is of opinion that this inspection is manifestly oppressive unless it is absolutely necessary for the plaintiff's case, and is one which ought not to be had, or, at any rate, which should be postponed until it is seen that it is necessary for the plaintiff's cause of action against the defendants that it should be had. There is a preliminary question to be decided, as has been pointed out by Lord Justice LINDLEY, and therefore I think the justice of this case requires that we should make the order which has been sketched out by him. That meets the merits of the case.

It was stated by counsel for the plaintiff that we had no power to postpone or to delay the carrying out of the order as it stood; in other words, he said he had obtained an order for discovery and inspection, the discovery had been completed, but the inspection had not; and, under these circumstances, he insisted that the Court had no power to say that that order should not be carried out; and that it must be carried out forthwith. I deny that. In my judgment the Court has jurisdiction, where it is necessary, to stay obedience to an order for such time as it thinks necessary. I think the order is a right one.

DAVEY, L.J.: My experience at the bar has led me to believe that the salutary and necessary power of the Court to order discovery and inspection of documents may in cases of this character be extremely oppressive to defendants, and I am not surprised that the defendants in this case desire to avail themselves of every power which the Rules of the Court give them to, at any rate, postpone the giving of that inspection. It is not only to the parties themselves that inspection of the documents and accounts of a company like the defendant company is oppressive, but it must be remembered that, if the documents which are discovered in this affidavit of documents are produced for inspection, the plaintiff will have the opportunity of inspecting the accounts of various persons

who are customers or clients of or borrowers from the defendants, and of making himself acquainted with affairs which are at present confined to the breasts of the defendants and their customers.

That being so, the plaintiff's counsel says that the issue which is raised on the amended pleadings is so unsubstantial that the Court ought not to stay its hand until the trial of that issue. I express no opinion either one way or the other as to what will be the result of the trial of that issue; but I am bound to say I do not think it frivolous or unsubstantial, and I think that the defendants ought to have the opportunity, if they are willing to take the risk of costs in doing so, of having that question, which they have now properly raised in their pleadings, decided, before the Court exercises the power it has of ordering inspection.

But then it is said that the defendants came too late. Now, speaking for myself only, I do not think that is so, according to the construction which I put upon Order XXXI. r. 20. It must be remembered that, before the plaintiff can get actual inspection, he wants a further order in addition to the common form order for discovery and inspection. I think that I am correctly stating the practice when I say that, after the affidavit of documents is put in, if the plaintiff wants inspection within a certain time, or at a certain place, he has to obtain a further order, and I do not see why the salutary provisions of Order XXXI. r. 20 should not be brought into force and exercised by the Court at any time when the Court is asked to make that order, or the intervention of the Court is sought for the purpose of obtaining inspection.

In my opinion, therefore, the case comes within the true construction of Rule 20 of Order XXXI., and I am not at all disposed to put a narrow construction upon that Rule, or to restrict the power thereby given to the Court to have questions or issues decided which, if decided one way, will render the inspection unnecessary. I think at whatever stage the party comes to ask for the intervention of the Court in order to procure inspection, inspection is sought within the meaning of this Rule. Therefore I agree with the order which has been proposed by Lord Justice LINDLEY.

Order varied.

Solicitors : *Gibbs, White & Crocker.*

R. C. Ponsonby.

PAGE v. MIDLAND RAILWAY.

1898, Oct. 27; Nov. 9. LINDLEY, A. L. SMITH, AND DAVEY, L.JJ.

Vendor and Purchaser—Covenants for Title—Defect appearing by Recital in Deed of Conveyance—Vendor's Liability.

A vendor's covenants for title are to be construed literally and without the importation of any exception not introduced by express words. Consequently, covenants for title which on their literal construction are wide enough to apply to a defect in title disclosed by a recital in the deed of conveyance itself, do in law so operate.

Hunt v. White (1) overruled.

APPEAL by the defendants from a decision of Romer, J., holding that they were not entitled to be indemnified by the respondents to the present appeal, who had been brought into the action as third parties.

The facts were as follows: Ann Palmer by her will, made in 1852, gave to her daughter, Amy Page, "the sum of 60*l.* already paid into Court by the Wolverhampton Railway Co. in part payment" of a certain piece of land "proposed to be taken by such company, and all sums of money which shall hereafter be paid by that or any other railway company in respect of any part of the said premises taken for railway purposes," and "subject thereto" the testatrix devised the said piece of land to Amy Page for life, with remainder to the children of Amy Page as tenants in common absolutely.

Ann Palmer died in 1855. Amy Page survived the testatrix and had three children—viz. a son, Joseph Page, and two daughters.

By a deed dated 26 June, 1879, and made between certain mortgagees of the said piece of land of the first part, Amy Page of the second part, and the defendants of the third part, after reciting in full the will of Ann Palmer, and reciting that the defendants had agreed with Amy Page for the purchase of the said land for an estate of inheritance in fee simple free from incumbrances, it was witnessed that, in consideration of the sum of 2,200*l.* paid by the company to the mortgagees, and of the sum of 3,050*l.* paid by the company

to Amy Page, the mortgagees thereby granted and released, and Amy Page thereby granted and confirmed, the said land to the company in fee simple free from incumbrances; and Amy Page, for herself, her heirs, executors, or administrators, thereby covenanted with the company that, notwithstanding any act or thing by Amy Page or the said Ann Palmer, or any of them, made, done, executed, or knowingly suffered, she, the said Amy Page, had then good power to confirm and grant the hereditaments thereby conveyed to the company in the manner aforesaid; and that the said hereditaments should at all times thereafter be held, occupied, and enjoyed by the company without any lawful interruption by Amy Page or any person claiming by or under her, or by, from, or under the said Ann Palmer; and that freed and discharged or otherwise by the said Amy Page, her heirs, executors, or administrators, sufficiently indemnified from and against all estates, incumbrances, claims, and demands whatsoever, made or to be made, occasioned or suffered by Amy Page, or any person lawfully claiming by, from, under, or in trust for her, or by, from, or under the said Ann Palmer, or any of them.

On the same day, but by a separate instrument, the defendants received from Joseph Page, son of Amy Page, an indemnity against all damages, costs, charges, and expenses which the defendants might sustain by reason of any claims or demands made by any children or other issue of Amy Page by reason of the purchase-money being paid to her.

Amy Page died in 1891. The present action was then brought against the defendants by Amy Page's two daughters, who claimed to be entitled to one-third each of the sum of 3,050*l.* paid by the defendants to Amy Page, on the ground that, upon the true construction of the will of Ann Palmer, Amy Page was only tenant for life of the land sold by her to the defendants and that the plaintiffs were entitled, as two of the three devisees in fee of the said land under Ann Palmer's will, to two-thirds of the purchase-money. The defendants thereupon obtained an order to have the executors of Amy Page brought into the action as third parties against whom the defendants claimed indemnity on the covenants for title entered into by Amy Page.

ROMER, J., decided in favour of the plaintiffs on the point as

to the true construction of the will of Ann Palmer, holding that under Ann Palmer's will Amy Page was only tenant for life of the lands sold by her to the defendants; he further held that the defendants were not entitled to indemnity from the third parties (Amy Page's executors), on the ground that Amy Page's covenants for title as vendor did not protect the defendants from the plaintiffs' claim, because Ann Palmer's will was fully recited in the conveyance to the company and because, having regard to the decision in *Hunt v. White* (1), the covenants for title ought to be read as confined to defects in the vendor's title not shown on the conveyance itself.

From this decision the defendants appealed on both points.

The appeal on the point as to the true construction of Ann Palmer's will was heard first, and was dismissed by the Court of Appeal on 27 October, 1898, the Court of Appeal holding that under that will Amy Page was only tenant for life of the land conveyed to the defendant company.

On the appeal of the defendants as against the third parties (Amy Page's executors) on the point as to indemnity,

Phipson Beale, Q.C., and Macnaghten, for the appellants:

The Judge below felt bound by *Hunt v. White* (1); that case may be distinguished, because there the vendor could in fact convey the fee; but here the vendor was only tenant for life. This Court, however, is not bound by that case, which has not found its way into the text-books on Conveyancing. The earlier authorities do not warrant the proposition therein laid down: see *Levett v. Withrington* (2), *Ogilvie v. Foljambe* (3), *Vane v. Barnard* (4), Butler's note to Coke Litt. tit. Warrantie, 384a. The plaintiffs claim under Ann Palmer, and the words of the covenant expressly cover a claim by any one claiming under Ann Palmer.

[They also referred to Davidson's Conveyancing Precedents [1877], Conveyances on Sales, p. 379; Rawle on Covenants for Title [1873], p. 116; Sugden on Vendors and Purchasers, 14th ed. p. 578; 9 Jarm. on Conv. 3rd ed. p. 381.]

(2) 1 Lutw. 317.

(3) 3 Mer. 53.

(4) Gilbert, 6.

Bramwell Davis (Neville, Q.C., and W. Shakespeare with him),
for the third parties (Amy Page's executors) :

The case is governed by *Hunt v. White* (1), decided so far back as 1868. The views taken by conveyancers on the point really favour the respondents' contention, as is shown by Butler's note in Coke Litt. 384a. The conveyance to the defendants contained a full recital of Ann Palmer's will, and therefore the defect or doubt in Amy Page's title appeared in the deed of conveyance itself. If the defendants intended that the covenant should cover defects appearing in the conveyance, they should have inserted words to that effect in the covenant.

Beale, Q.C., replied.

Cur. adv. vult.

November 9.

LINDLEY, L.J. : This is an appeal from a portion of the judgment of Mr. Justice ROMER, which decided that the Midland Railway was not entitled to any relief in respect of a covenant for title entered into by Amy Page, who sold some land to them. The circumstances giving rise to the company's claim were shortly as follows : One Ann Palmer devised certain lands to Amy Page, but in such language as to render it doubtful whether she took in fee or for life only. The company bought some of this land from her and took a conveyance from her in fee and paid her the price of the fee ; and by the deed of conveyance she entered into the usual covenants for title. Amy Page died in 1891. An action was then brought by persons claiming the land under Ann Palmer's will, upon the footing that Amy Page was only tenant for life, and that on her death the land vested in the plaintiffs. The railway company contested this claim, relying on the terms of Ann Palmer's will ; but the company also brought in Amy Page's executors as third parties, and claimed to be indemnified by them under her covenant for title, in the event of its being decided that Amy Page was tenant for life only. Mr. Justice ROMER first, and this Court afterwards, decided that Amy Page took only an estate for life. The result of this was that the plaintiffs in the action are entitled to recover the value of the land from the company. But Mr. Justice ROMER further decided that the company had no remedy

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against Amy Page's representatives under her covenant for title ; this is the point we have now to determine.

Before addressing myself to this question it is important to observe that the conveyance by Amy Page to the company was made by her as an ordinary vendor in fee. The conveyance was not made by her under the statutory powers conferred on tenants for life by the Lands Clauses Consolidation Act ; nor was the purchase-money paid into a bank pursuant to those sections in the same Act which apply to purchases from tenants for life and persons whose titles are doubtful. Moreover, the company did not, by their pleadings or at the bar, claim to have acquired a good title under that statute, or contend that the plaintiffs' remedy (if any) was for compensation under section 68 of the Lands Clauses Consolidation Act. Nor did the third parties (Amy Page's representatives) raise any such point. Both in the Court below and in this Court the case has been fought on different lines ; and the only controversy has been respecting the true construction of Ann Palmer's will, and the true construction and effect of Amy Page's conveyance to the defendants.

I think it necessary to call attention to these facts in order to prevent misconception as to the scope of the present decision. I say nothing on the point whether the defendants could or could not have defended the action brought against them, on the ground that they had obtained a good statutory title, and that the plaintiffs' proper course was to proceed to obtain compensation under section 68 of the Lands Clauses Consolidation Act ; nor do I say anything on the point whether, having regard to the Lands Clauses Consolidation Act, the plaintiffs have any title to any estate or interest in the land conveyed to the company as distinguished from a claim to compensation under section 68.

Mr. Justice ROMER decided that Amy Page's covenant for title did not protect the company from the plaintiff's claim, because Ann Palmer's will was recited in the conveyance to the company, and because the covenant for title ought to be confined to defects in the vendor's title not shown on the conveyance. In so deciding Mr. Justice ROMER followed a decision of Vice-Chancellor MALINS in 1868, viz. *Hunt v. White* (1), which he did not consider himself at

liberty to depart from; and the question we have to determine is whether the principle on which that case was decided ought to be upheld or not. If that case had been generally followed as correct, I for one should not think it right now to disturb it, even if I did not approve it. But, singularly enough, the decision seems to have been lost sight of. The case does not appear ever to have been cited in Court; nor is it to be found in the text-books on Real Property and Conveyancing which legal practitioners are in the habit of consulting. The note in Dart's Vendors and Purchasers, 6th ed. note (g), p. 886, shows that eminent conveyancers, at all events, regard the principle on which Vice-Chancellor MALINS proceeded as by no means settled. Under these circumstances this Court ought, in my opinion, to treat the question as still open, and to decide it on sound principles of construction.

To what is a vendor's covenant applicable? Is it to the title shown to the purchaser, or is it to the title expressed to be conveyed to him? The answer to this question can only be found by reading the whole conveyance, including the covenant for title. If on the true construction of the whole document the title conveyed is clear, and the covenant is so worded as to apply to the title so conveyed, then, although the recitals may show some defect or uncertainty in the vendor's title, effect ought to be given to the words of the covenant so as to give to the purchaser the title which the deed shows he was to have.

In the case supposed, there is no warrant for giving the words a more restricted meaning than that which they ordinarily bear; no warrant for qualifying the acts covenanted against by inserting "save as herein appears" or "save as shown by the abstract," or "save as explained before the execution of the deed"; or any words to any such effect. If a vendor does not intend that his covenant for title shall extend to defects disclosed to the purchaser, whether on the face of the deed or *aliunde*, the vendor must take care not to word his covenant so as in terms to cover such defects; or he must insert some clause in the deed clearly explaining and controlling his covenant. This is in accordance with ordinary rules of construction and with fair dealing. No doubt a purchaser is well advised to make the matter plain by inserting words to show that even defects known to him are intended to be covered; and this is what con-

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veyancers have advised for years (see Butler's note to Coke Littleton, 884*a*, and the other works cited by the counsel for the appellants). But they have advised this course only as a matter of prudence and precaution.

Apart from *Hunt v. White* (1), there is no authority for not giving effect to the clear and express words of a vendor's covenant for title simply because a defect covered by them was disclosed by a recital in the conveyance. The principle on which that case was decided is, in my opinion, manifestly unsound.

I pass now to Amy Page's conveyance itself. [The Lord Justice read the material parts above set out of the conveyance, and proceeded:] The words of the conveyance and of the covenant for title are quite clear and unambiguous, and the covenant, as it is worded, clearly extends to claims by persons deriving title through Ann Palmer. These words may, no doubt, have been put in to cover unknown acts done by her; but they are not really wanted for this purpose, and they may well have been put in to emphasize the fact that the covenant was really intended to extend to her acts in particular, as well as to those of the vendor and the vendor's other predecessors in title.

The fact that in this case the company took a separate indemnity from a third person cannot affect the construction of the vendor's covenant.

I am of opinion, therefore, that this appeal should be allowed, and that the order of Mr. Justice ROMER should be varied in accordance with the notice of appeal, except that the indemnity must be confined to the value of the land claimed by the plaintiffs and interest thereon from the death of the tenant for life, and is not to extend to the costs of the plaintiffs which the defendant company have been ordered to pay. These costs could not, I apprehend, be recovered by the railway company in an action at law on the covenant. The third party to pay costs of the appeal and of the proceedings against them.

A. L. SMITH, L.J.: I have had the opportunity of reading the judgment of Lord Justice LINDLEY, which has just been delivered. I entirely agree with it, and have nothing to add.

DAVEY, L.J., read the following judgment: The question on this appeal is whether the railway company have a right under the covenants for title contained in a conveyance to them of 26 June, 1879, to be indemnified by the representatives of Amy Page against the claim of the plaintiffs in the action, which in the previous appeal we have held to be well founded in law. The conveyance in question is made between certain mortgagees of Amy Page and her husband of the first part, Amy Page of the second part, and the railway company of the third part; it contains a full recital of the will of Ann Palmer, under which Amy Page and the plaintiffs derive title, and under which the question of title arises. There was, therefore, full notice on the face of the instrument of the nature and grounds of the claim made by Amy Page and of the title of the plaintiffs. There is a recital of an agreement with Amy Page for the purchase of the land for an estate of inheritance in fee simple free from incumbrances; but the deed contains no express recital of an intention to protect the railway company from any claim of the plaintiffs by the covenant for title. By the operative part it is witnessed that in consideration of 2,200*l.* paid to the mortgagees, and the further sum of 3,050*l.* paid to Amy Page, she and her mortgagees convey to the company in fee simple; and then follow the covenants for title which have been read by Lord Justice LINDLEY.

We have determined on the first appeal (in this case) that Amy Page had no power to give the company a discharge for the purchase-money, and the plaintiffs, in the events which have happened, have a right to claim it against the railway company in some form of action. Under these circumstances the company claim to be indemnified by the representatives of Amy Page against the claim of the plaintiffs. It may be mentioned that the company at the time of the conveyance took an indemnity from one of the beneficiaries. Now it is not disputed on the pleadings or by counsel at the bar that the claim of the plaintiffs is "a claim or demand made by a person claiming under Ann Palmer" against or in respect of the lands in question; or that it is occasioned by an "act or thing made, done, or executed by Ann Palmer"; or (in other words) that there would be a breach of the covenant if it is to be construed literally. But it is said that, assuming this to be so, we ought to construe the covenant so as not to cover any claim or demand arising out of matters appearing on the face of the conveyance.

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The question which we have to decide, therefore, is (assuming there would otherwise be a breach of the covenant), ought we to read into the covenant by construction an exception of defects of title or incumbrances appearing on the face of the instrument; or to imply the words "save as appears by these presents," or similar words? In support of this argument a case of *Hunt v. White* (1), decided by Vice-Chancellor MALINS in 1868, has been referred to, and Mr. Justice ROMER felt himself bound by this authority and decided accordingly, without expressing any opinion of his own. It is conceded that there is no other authority on the point, and although it might be possible to distinguish *Hunt v. White* (1) in one respect, I am of opinion that the Vice-Chancellor intended to decide that case on general grounds. The Vice-Chancellor says, "If the object had been that the vendor was in all respects to guarantee the purchaser's title, the covenants for title should have been extended by express words to meet that case;" and further on, "the covenant for quiet enjoyment can only extend to protect the purchaser from incumbrances and defects in the title of which the purchaser has no notice"; and he concludes his judgment, "where the title is made under a written instrument the purchaser must put his construction upon the instrument and must be bound thereby. It would be a perversion of law to say that the covenant extended to cover such a case as this—viz. the misconstruction by a purchaser of the written instrument under which he takes his title and conveyance."

The Vice-Chancellor was himself a conveyancer of considerable experience, and his opinion upon such a point is entitled to the highest respect. But still, it is only the learned Judge's opinion, and we are bound to express our opinion whether we agree with it. The Vice-Chancellor's proposition is certainly expressed too widely, for—where the defect is one of which the purchaser has notice, though it does not appear on the face of the conveyance—it was held in *Levett v. Withrington* (2), that notice of the defect in title relied on as a breach is no defence to an action on the covenant in respect of the breach. And, indeed, I adopt the statement of the learned editors of *Dart on Vendors and Purchasers*, vol. ii. 6th ed. p. 886, and it would, in my opinion, be contrary to principle to hold that the construction or effect of a covenant can be controlled by extrinsic evidence of notice or intention. The Vice-Chancellor's

opinion, however, seems to be based on the fact of notice independently of the source from which it was derived. Various opinions of text-writers on Conveyancing were referred to in the course of the argument, the most important of which is Mr. Butler's note to Co. Litt. 384a. [The Lord Justice read the passage and proceeded:] It does not appear to me that this passage or the passages read from the other law works really assist the Court, as they seem to me to amount to nothing more than a salutary caution by the learned authors to the practitioner; and I agree with the note (g) in Dart, 6th ed. p. 886.

Looking at the question, therefore, unfettered by binding authority, I am of opinion that it is safer and more consistent with principle to construe the covenant literally, without importing into it any exception or qualification which the parties have not themselves introduced by express words, and to say that if the parties do not intend the covenant to be so construed for the protection of the purchaser they should express their intention instead of throwing upon those who maintain that the covenant should be read according to the ordinary use of language the *onus* of finding an expressed intention to that effect. I may add that I think this construction is at least as likely to be in accordance with the intention of the parties as the construction contended for at the bar.

I am, therefore, of opinion that the general rule laid down in *Hunt v. White* (1) cannot be supported; and notwithstanding that the case has been in the books for twenty-five years, I think we ought not to follow it. It does not appear to have been extensively known—it is not even referred to in Dart (6th ed., published in 1888)—and I cannot think that any titles depend upon it. The result will be that the claim of the railway company against the representatives of Amy Page ought, in my opinion, to succeed; and the judgment of the learned Judge in the Court below (though I do not know that we are differing from his own opinion) must be reversed.

Solicitors: *Beale & Co.; Timbrell & Deighton.*

IN RE SOMERSET, SOMERSET v. POULETT (EARL).

1893, October 27, 28, 30; November 9. LINDLEY, A. L. SMITH
AND DAVEY, L.JJ.

Trustee—Breach of Trust—Investment on Mortgage—Insufficient Security—Statute of Limitations—Impounding Interest—Consent of Beneficiary—Trustee Act, 1888 (51 & 52 Vict. c. 59), ss. 6, 8.

A breach of trust had been committed by trustees in 1878 by investing trust money on mortgage upon property of insufficient value, at which date the cause of action in respect thereof arose:—

Held, that payment of interest to the tenant for life by the trustees, from 1878 to 1890, was not an acknowledgment by the trustees of a liability to repay the principal, and that the action against the trustees by the tenant for life for breach of trust was barred by section 8 of the Trustee Act, 1888.

In order to give a Court power under section 6 of the Trustee Act, 1888, to impound the interest of a beneficiary by way of indemnity to trustees, the beneficiary must “instigate,” “request,” or “consent in writing,” to some act or omission which is itself to his knowledge a breach of trust, and not to some act or omission which only becomes a breach of trust by reason of want of care on the part of the trustees.

APPEAL from a decision of Kekewich, J.*

This action was brought by Vere Somerset and his infant children against the surviving trustees of his marriage settlement to have made good certain breaches of trust which were alleged to have been committed by them in investing the trust moneys on insufficient security.

By the settlement, dated in 1875, it was declared that the defendants and another trustee, who died in 1881, should stand possessed of certain stocks and securities upon trust, after the marriage, with the consent in writing of the husband and wife during their joint lives, and of the survivor during his or her life, to sell and invest the same on real and other securities, and to pay the income to the husband for life, then to the wife for life, and after the death of the survivor to hold the capital on trusts for the children of the marriage.

In 1878 Vere Somerset was desirous that the trust funds should be invested upon mortgage of the Hawkstone Estate, in Shropshire,

* 3 R. 547; 62 L. J. Ch. 720; 68 L. T. 613; 41 W. R. 536.

belonging to Lord Hill. With a view to this investment, one Berger, who was Lord Hill's solicitor, was employed to instruct a firm of valuers to value the estate on behalf of the trustees. Instructions were accordingly sent to Farebrother, Ellis, Clark & Co., together with a letter, which was as follows: "It is desired by both mortgagor and mortgagees that as much money shall be advanced as you can advise will be properly secured." Sir J. W. Ellis valued the property at 42,750*l.*, estimating the net rental at 1,070*l.*, and advised that 30,000*l.* could be safely advanced upon it. Subsequently Sir J. W. Ellis wrote advising the trustees that 35,000*l.* might be safely advanced, on the ground that the property might be let at higher rents if Lord Hill would sanction that being done.

The trust funds, consisting of Brazilian and Russian bonds, were thereupon sold, and the proceeds, amounting to 34,612*l.*, were advanced to Lord Hill upon security of the Hawkstone property. The investment was made with the consent in writing of Mr. and Mrs. Vere Somerset, and at the request of the former. Mrs. Vere Somerset died in 1889.

Part of the mortgaged property had been sold, but what remained was stated to be wholly insufficient to satisfy the balance of the mortgage debt. KEKEWICH, J., held that, as between the infant plaintiffs and the defendants, the investment was a breach of trust, that the defendants were jointly and severally liable to make good to the trust estate the difference between the sum actually advanced on the security of the mortgaged property and 26,000*l.* which was the largest sum which might properly have been advanced by the trustees on the security thereof, and that the same plaintiffs were entitled to a lien on the proceeds of sale of the property already sold and to the property remaining unsold for the payment of that amount. His Lordship also made a declaration that, as between Vere Somerset and the defendants, his right to sue was barred by section 8 of the Trustee Act, 1888, and, further, that the defendants were entitled to have his life interest in the whole trust estate impounded under section 6 by way of indemnity to them against their liability.

The plaintiff Vere Somerset appealed.

Warmington, Q.C., and O. L. Clare, for the appellant, Vere Somerset :

The fact that a breach of trust has been committed is not now in controversy. First, section 8 of the Trustee Act, 1888 (1), does not bar the appellant's claim against the trustees to have the trust moneys made good. The date of the receipt of the trust moneys by the trustees was not later than 24 August, 1878—the date when the trust funds were invested in the mortgage of Lord Hill's estate. The trustees paid the interest to the appellant as tenant for life up to August, 1890, and by such payment kept alive the debt up to that date, and the writ in this action was issued on 23 September, 1892. The trustees can only plead lapse of time as a bar "in the like manner and to the like extent" as if the claim had been made against them in an action for money had and received: section 8, sub-section 1 (b). [*In re Bowden*, *Andrew v. Cooper* (2), *Want v. Campain* (3), *In re Swain*, *Swain v. Bringeman* (4), and *In re Page*, *Jones v. Morgan* (5), were referred to on this point.]

(1) Section 6, sub-section 1 of the Trustee Act of 1888 provides: "Where a trustee shall have committed a breach of trust at the instigation or request or with the consent in writing of a beneficiary, the Court may, if it shall think fit, . . . make such order as to the Court shall seem just for impounding all or any part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee or person claiming through him."

By section 8, sub-section 1: "In any action or other proceeding against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by the trustee, and

converted to his use, the following provisions shall apply: (a) All rights and privileges conferred by any Statute of Limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him; (b) if the action or other proceeding is brought to recover money or other property, and is one to which no existing Statute of Limitations applies, the trustee or person claiming through him shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received . . ."

(2) 45 Ch. D. 444 ; 59 L. J. Ch. 815 ; 39 W. R. 219.

(3) 9 Times L. R. 254.

(4) [1891] 3 Ch. 233 ; 61 L. J. Ch. 20 ; 65 L. T. 296.

(5) 3 R. 171 ; [1893] 1 Ch. 304 ; 62 L. J. Ch. 592 ; 41 W. R. 357.

Secondly, the appellant's life interest cannot be impounded by way of indemnity to the trustees under section 6 of the Trustee Act, 1888 (1), because that section only applies when the breach of trust has been committed at the instigation, or request, or with the consent in writing, of the beneficiary. What has to be consented to or instigated by the beneficiary is the breach of trust, and the beneficiary must therefore necessarily be aware of the breach of trust. The breach of trust in the present case consisted, not in the mere investing the trust funds in a mortgage of real estate, but in the investing of this particular sum (34,612*l.*) on the security of a mortgage of this particular estate, the net rental of which, as shown by the valuation, was only 1,070*l.* The appellant was not shown that valuation, and the evidence shows that he did not know what the rental of the property was. He did not know, and had not the means of judging, whether the estate was or was not a sufficient security for the sum advanced by the trustees, and he did not instigate the trustees to take an insufficient security, which is really what constitutes the breach of trust in this case. [They referred to *Raby v. Ridehalgh* (6).]

Marten, Q.C., and *J. H. Carson*, for the respondents, the trustees :

The appellant's claim is barred by section 8 of the Trustee Act, 1888 (1). The interest on the mortgage was paid direct to the appellant by the mortgagor ; it was not paid by the trustees. But, assuming that the interest was received by the trustees, and paid by them to the appellant, yet such payment was not an acknowledgment by the trustees of their liability to pay the difference between what was actually advanced and what might have been properly advanced on the security of the mortgage ; the interest was merely paid in respect of the mortgage debt. The form of order made in *Want v. Campain* (3) is given in *Seton on Decrees*, 5th ed. vol. iii. p. 2127. On the second point, the investment here was made with the consent in writing of the appellant ; it is not necessary that the act must be known to be a breach of trust by the tenant for life as well as by the trustees : *Raby v. Ridehalgh* (6).

[DAVEY, L.J.: Section 6 of the Trustee Act, 1888, was based on the law as laid down in that case.]

It was the duty of the tenant for life to satisfy himself of the sufficiency of the security before giving his consent to the mortgage: *Trafford v. Boehm* (7). The liability there is put upon the approbation of the consent to the breach of trust. Consent was also the ground of the decision in *Sawyer v. Sawyer* (8), which was the case of a married woman before 1888—

[DAVEY, L.J.: The investment itself was a breach of trust, so she necessarily knew it]—

and also of the decision in *Griffith v. Hughes* (9), which was concerned with a married woman after 1888. The Court ought to assume that here the tenant for life had brought home to him all the facts of the case, inasmuch as the solicitors, who were acting for all parties, were aware of those facts. Nobody intended to commit a breach of trust. The trustees have clearly brought themselves within sections 6 and 8 of the Act, the object of which was to protect honest trustees when the *cestui que trust* gave his consent to a state of things which resulted in a breach of trust.

Warmington, Q.C., in reply :

The trustees allowed the interest on the mortgage to be paid direct to the tenant for life, who consequently, in point of law, received it as their agent. The Statute of Limitations does not apply, as the transaction did not amount to money had and received to the plaintiffs' use. The consent of the tenant for life did not discharge the trustees from their duty, which was to make a proper investment; they knew their investment was a breach of trust, and did not inform him of that fact. Even assuming a breach of trust on the part of the tenant for life, the Court ought, according to the language of section 6 of the Act, to weigh all the

(7) 3 Atk. at p. 444.

(8) 28 Ch. D. 595; 54 L. J. Ch. 444; 52 L. T. 292; 33 W. R. 403.

(9) [1892] 3 Ch. 105; 66 L. T. 760; 40 W. R. 524.

circumstances in considering, in regard to knowledge and means of knowledge, who were the parties that ought to suffer.

Cur. adv. vult.

November 9.

LINDLEY, L.J.: The first question raised by this appeal is, whether the Statute of Limitations is a bar to the claim of the plaintiff and appellant, Vere Somerset, to have the trust moneys made good. The second question is, whether the trustees, who, whether the plaintiff is barred or not, have to make those moneys good, are entitled to indemnity during the plaintiff's life. Both these questions turn on the Trustee Act, 1888, but they turn on different sections of it. The first question turns on section 8. [His Lordship read the section.] The breach of trust for which the trustees have been declared responsible is the investment of money on mortgage of property of insufficient value. There has been no fraud, nor any conversion of the trust property to the use of the trustees. They advanced the trust money on mortgage in August, 1878. That was the breach of trust. The mortgagor paid the interest on the money to the plaintiff as tenant for life until August, 1890, and the action against the trustees was commenced in February, 1892—*i.e.* more than six years after the investment, but considerably less than six years since the last payment of interest. The breach of trust is not now in controversy, and it is conceded that the defendants are liable for it to the infants who are entitled to the funds subject to the life interest of Vere Somerset. The question is as to his right to relief. The fact that the interest was paid direct by the mortgagor to the plaintiff as tenant for life, and not by the trustees to him, is, in my opinion, immaterial. In point of law the payment amounts to a payment by the mortgagor to the trustees pursuant to his covenant, and to payment by them of the money so received to the plaintiff as tenant for life, pursuant to the trusts which the trustees had undertaken to perform. But then arises the question, what is the effect of such a payment with reference to the Statute of Limitations? What does such payment admit? It is not an admission or acknowledgment of any breach of trust, nor of any liability on the part of the trustees that they are liable to make good the principal sum to the plaintiff or any other of their *cestuis*

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que trustent; it is a mere acknowledgment that they have received from the mortgagor so much money in respect of his mortgage. But such an admission will not suffice to deprive the trustees of the protection afforded by the Statute of Limitations.

In applying the analogy of an action for money had and received to the use of the plaintiff we must not shut our eyes to the truth. We must not first of all treat the trustees as debtors of a sum which they do not admit they owe, and then treat the payment of interest as an acknowledgment that they owe that sum and are liable to make it good. We must look at the facts and see what it is that the payment of interest really does admit and acknowledge, and unless the facts are such as to justify the inference that the trustees admitted their liability to make good the principal, the payment of the interest will not deprive them of the benefit of the statute. This is conclusively shown by *Foster v. Dauber* (10), *Davies v. Edwards* (11), and *Morgan v. Rowlands* (12), where the principles applicable to the law on this subject are fully explained. In *Morgan v. Rowlands* (12) it was held that payment of interest pursuant to a judgment in an action brought to recover interest only did not prevent the Statute of Limitations from being a bar to another action brought within six years for the recovery of the principal debt itself. Upon this point, therefore, the appeal fails.

The second question is whether, in order to indemnify the trustees, the Court ought to impound the income of the trust funds during the life of the appellant. This question turns on the construction of section 6 and on the conduct of the parties. [His Lordship read the section.] Did the trustees commit the breach of trust for which they have been made liable at the instigation or request or with the consent in writing of the appellant? The section is intended to protect trustees, and ought to be construed so as to carry out that intention. But the section ought not, in my opinion, to be construed as if the word "investment" had been inserted instead of "breach of trust." An enactment to that effect would produce great injustice in many cases.

(10) 6 Ex. 839; 20 L. J. Ex. 385.

(11) 7 Ex. 22; 21 L. J. Ex. 4.

(12) L. R. 7 Q. B. 493; 41 L. J. Q. B. 187; 26 L. T. 855; 20 W. R. 726.

In order to bring a case within this section the *cestui que trust* must instigate or request or consent in writing to some act or omission which is itself a breach of trust, and not to some act or omission which only becomes a breach of trust by reason of want of care on the part of the trustees. If a *cestui que trust* instigates, requests, or consents in writing to an investment not in terms authorized by the power of investment, he clearly falls within the section, and in such a case his ignorance or forgetfulness of the terms of the power would not, I think, protect him, at all events not unless he could give some good reason why it should—*e.g.* that it was caused by the trustee. But if all that a *cestui que trust* does is to instigate, request, or consent in writing to an investment which is authorized by the terms of the power, the case is, I think, very different. He has a right to expect that the trustees will act with proper care in making the investment, and if they do not they cannot throw the consequences on him, unless they can show that he instigated, requested, or consented in writing to their non-performance of their duty in this respect. This is, in my opinion, the true construction of this section. As regards the necessity for a writing, I agree with the decision of Mr. Justice KEKEWICH in *Griffiths v. Hughes* (9), that an instigation or request need not be in writing, and that the words “in writing” apply only to the consent. I pass now to the facts. It is, in my opinion, perfectly clear that the appellant instigated, requested, or consented in writing to the investment by the trustees of the trust money on a mortgage of Lord Hill’s estate. This, indeed, was not disputed. But the evidence does not, that I can see, go further than this. He certainly never instigated, requested, or consented in writing to an investment on the property without inquiry, still less if upon inquiry the rents payable in respect of the lands mortgaged were found to be less than the interest payable on the mortgage. Whether the appellant knew the rental is a very important question. Mr. Justice KEKEWICH has found that he did. But the evidence does not, in my opinion, warrant this inference. The appellant certainly knew a good deal about the property, and Colonel Hill, to whom he very much trusted, most likely knew more than the appellant himself. There was also a proposal from Lord Hill, which the appellant once had, but which was lost. This might have shown the rental. But the appellant

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positively denies that he knew the rental, and says that Haste, the mortgagor's agent, told him it was 1,700*l.* a year, whilst in fact it was only 1,078*l.* net.

It was contended that Wilde, Berger & Co., who were the solicitors of the mortgagor and of the trustees, were also the solicitors of the appellant, and that through them he must be treated as having known of the valuation and the rental and all other material facts. But to affect him with this notice would be extremely unjust, for the facts, acknowledgment of which the Court is asked to impute to him, were clearly kept from him. The solicitors obtained the valuation for and on behalf of the trustees; they obtained the second opinion of the valuers for the benefit of the borrower and for the protection of the trustees. In obtaining the valuation and opinion the solicitors were not acting for or on behalf of the appellant, and, considering that they never disclosed the valuation or opinion to the appellant and never informed him of their effect, he cannot, in my opinion, be held to have known them. It is important to observe that the statute does not make a *cestui que trust* responsible for a breach of trust simply because he had actual or constructive notice of it; he must have instigated or requested it, or have consented to it in writing. Even if the knowledge of his solicitors could be imputed to him for some purposes, it is not true in fact that the appellant did by himself or his agent instigate, request, or consent in writing to the breach of trust. Even if the appellant had constructive notice through his solicitors of the valuation, the Court in exercising the power conferred upon it by the statute would in my opinion be acting unjustly, and not justly, if, under the circumstances of this case, it held the appellant liable to indemnify the trustees. The Court would be treating the appellant as having done more than he did, and I can see no justification for such a course. It must be borne in mind that the plaintiff was not seeking to benefit himself at the expense of the remaindermen, as in *Raby v. Ridehalgh* (6). He was seeking a better security for the trust money for the benefit of every one interested in it. Under these circumstances, and for these reasons, I am unable to concur in Mr. Justice KEKEWICH's judgment on this point, and his judgment must be varied accordingly. The result will be that the appellant will receive the

income yielded by the trust fund which is not lost, but will not receive any personal benefit from what the trustees have to make good.

A. L. SMITH, L.J.: Two points arise upon this appeal: the one whether the defendants, who in 1878 invested upon mortgage the trust funds of Vere Somerset's marriage settlement upon insufficient security in such circumstances as to constitute a breach of trust, are, in an action brought against them by him and other beneficiaries some thirteen years afterwards for such breach, as against Vere Somerset, in a position to take advantage of the Trustee Act, 1888, and to set up the Statute of Limitations; the other is whether Mr. Justice KEKEWICH was right in granting to the defendants the indemnity provided by section 6, sub-section 1 of that Act. Section 8, so far as material to the case, reads as follows: "If the action is brought to recover money or property the trustee shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received."

It appears to me that this is an action brought to recover money, for it is an action to recover from the defendant trustees the money which has been lost to the trust funds in consequence of their breach of trust. It was conceded at the bar that it is the statute of 21 Jac. I. c. 16, imposing a limitation of six years, which applies to this case. It is said by the defendants, and in this I agree, that the defence is to be treated as if it were a plea of the Statute of Limitations pleaded at common law to an action for money had and received. The cause of action was complete in 1878, when the defendants committed the breach of trust, and, consequently, unless the plaintiff, Vere Somerset, can make out some acknowledgment so as to take the case out of the statute, it will apply. This he seeks to do by showing that he received the interest upon the trust funds invested upon mortgage down to the year 1890.

It has long since been settled that the mere fact of part payment of a debt is not sufficient to take a case out of the Statute of Limitations. Sir Frederick POLLOCK, C.B., once directed a jury that

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it was, but that direction was held to be undoubtedly erroneous : *Wainman v. Kynman* (13). To take the case out of the statute there must be a part payment of the debt under such circumstances as establish a promise to pay the remainder ; or, as Baron PARKE said in *Davies v. Edwards* (11), “ the party who makes the payment must say in effect, ‘ I make this payment on account of the debt.’ ” The same applies to the payment of interest. To take the case out of the statute there must be a payment of interest *qua* interest due upon the debt, thereby acknowledging more to be due : *Sims v. Brutton* (14). It is true that in this case Vere Somerset received periodically down to 1890 interest upon the moneys lent by the trustees to Lord Hill upon mortgage. Even if this interest had been paid to him by the defendants, which it was not, for apparently he received it direct from Lord Hill, though I do not think this is material, how can such payment of interest be an acknowledgment by the defendants that they owed Vere Somerset more money ?

If the trustees had paid the interest to the plaintiff they would not have paid it as interest on money of his in their hands and due from them to him, but as interest received from the mortgagor : see *Sims v. Brutton* (14). The payment of interest in this case was not made as a payment by the defendants on account of any debt due from them to the plaintiff or on account of any liability they were under to him. At the most, it was an admission that the trust funds were duly invested by them on behalf of the *cestui que trust*. It was, in fact, a payment of the interest due from Lord Hill under the mortgage deed to the plaintiff, and nothing more. It is impossible to twist this payment of interest into an admission by the defendants of a debt due from them to Vere Somerset, as he now attempts to do, to avoid the effect of the statute. In my judgment, Mr. Justice KEKEWICH arrived at a right conclusion when he held that the Statute of Limitations was a bar to this action for breach of trust by Vere Somerset against the defendants.

I now come to the second point, which is, whether the trustees committed the now unquestioned breach of trust at the instigation, or request, or with the consent in writing, of the beneficiary, Vere Somerset, so as to entitle them to apply for the indemnity provided

by section 6, sub-section 1 of the Act of 1888. It is necessary, in the first place, to ascertain the true meaning of this section. Does it mean that in order to entitle to the indemnity it must be proved that the beneficiary had instigated, requested, or consented in writing knowing facts which rendered what he was instigating, requesting, or consenting in writing to would be a breach of trust; or will it suffice if it be proved that the beneficiary merely instigated, requested, or consented in writing, not knowing that it was a breach of trust, but which in fact it turned out to be? The words of the section are: "Where a trustee shall have committed a breach of trust at the instigation or request or with the consent in writing of a beneficiary." The words are not where a trustee shall have made an investment at the instigation, request, or with the consent in writing of a beneficiary which turns out to be a breach of trust, but are when he shall have committed a breach of trust at the instigation and consent of the beneficiary. Ordinarily a person can only instigate, request, or consent to that which he knows. In my opinion, upon the true reading of this section, a trustee, in order to obtain the benefit conferred thereby, must establish that the beneficiary knew the facts which rendered what he was instigating, requesting, or consenting to in writing a breach of trust. This issue is upon the trustee when he asks for relief under the section, and the question is, Have the defendants in this case established it?

It was proved that Vere Somerset was anxious from the year 1876 that his trust funds (which amounted to about 35,000*l.*) should be shifted out of the securities they then were in and invested upon Lord Hill's Hawkstone Estate. He was desirous that this should be done so as to have a better security for the trust funds. He knew that the acreage of this estate was 722 acres. He knew the farms, their names, and the locality in which they were situated. He consulted his father-in-law, Colonel Hill, upon the matter, who was a trustee of the Hawkstone Estate, and who, according to the plaintiff's own evidence, undertook the negotiations with Lord Hill and Haste (Lord Hill's agent) as regards the proposed advances. Colonel Hill presumably was well acquainted with the farms. It was proved that Vere Somerset pressed the defendants to make the advances against the Hawkstone property, and signed a written consent in that behalf. The above facts, in my judgment, were established.

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It was not proved, as Mr. Justice KEKEWICH apparently thought, that Vere Somerset knew that the rental of the Hawkstone Estate was only 1,070*l.* There is no evidence of this, but, on the contrary, his evidence was that he was told by Haste that the rental was 1,700*l.* a year. Now, did Vere Somerset know, as Mr. Justice KEKEWICH also thought, that 42,750*l.* was the figure arrived at by Sir J. W. Ellis as the value of the estate? It does appear from the report made by Sir J. W. Ellis, which the trustees obtained for their own information, and which they never communicated to Vere Somerset, that the net rental of the property was 1,078*l.*, and was consequently less than the annual amount required to pay the interest at four per cent. upon the 35,000*l.* advanced by about 800*l.* a year. It also appeared upon the report that to arrive at the 42,750*l.* which Sir J. W. Ellis estimated the property as being worth it would be necessary that it should realize forty years' purchase upon the actual rental, which on agricultural land such as this was admitted to be an unheard-of thing.

It is true that Sir J. W. Ellis estimated that the rentals might be increased to 1,425*l.* a year, which is just over what was required to pay the interest, and upon this estimate he got his 42,750*l.* by thirty years' purchase. It cannot, I think, be doubted that the security was wholly insufficient for an investment of trust funds amounting to 35,000*l.* All that Vere Somerset was told was that Sir J. W. Ellis had reported that the estate was sufficient security for 30,000*l.*, and he was subsequently told that the trustees had arranged to advance a further 5,000*l.*, for which Vere Somerset gave his written consent.

In these circumstances, have the trustees established the issue which is upon them? My answer is, No. It is true that Vere Somerset desired for his trust funds the security of the Hawkstone Estate, which he knew consisted of 722 acres, and that he pressed for it; but it has not been proved that he knew that the rental was only 1,078*l.*, nor how Sir J. W. Ellis came to the conclusion that it was a sufficient security for 35,000*l.* This information, which the trustees had, they kept to themselves, and never communicated it to Vere Somerset. In my judgment, the true view of the evidence is that, although much desiring and pressing for the investment, Vere

Somerset left it to the trustees to determine if it were a proper one for the moneys proposed to be advanced, and was thinking that he was getting a good and secure investment for his trust moneys.

So much for the knowledge and conduct of Vere Somerset himself. Then a further point was made on behalf of the trustees, which was that, as Wilde, Berger & Co. knew all the facts, and as they acted as solicitors for Vere Somerset in the transaction, notice to them of Sir J. W. Ellis' report was notice to Vere Somerset of the facts therein contained, and consequently their knowledge of these facts was his knowledge. The circumstances are these. Wilde, Berger & Co. were solicitors, and Lord Hill the proposed mortgagor. One Jenkyns had been the solicitor of the trustees, but in order to save expense Vere Somerset requested that Wilde, Berger & Co. should be permitted to act both for Lord Hill and the trustees, and this was assented to.

Upon 9 March Vere Somerset changed his solicitor, Jenkyns, and appointed Wilde, Berger & Co. to also act for him. The retainer of Wilde, Berger & Co. by Vere Somerset was given to them so that they might be able more readily to carry out what Vere Somerset and his wife had to do to complete the transaction than if two solicitors were engaged. Wilde, Berger & Co. were not engaged by Vere Somerset to negotiate the transaction of the loan on his behalf, or to advise him as to whether it ought or ought not to be carried out. The information Wilde, Berger & Co. obtained about the rent and value of the estate was obtained by them solely on behalf of the trustees, and it may be in the interests of the borrower, Lord Hill, but certainly not on behalf or in the interest of Vere Somerset, and thus the information so obtained was never communicated to him.

In these circumstances, in my judgment, it would be wrong to hold that the knowledge of Wilde, Berger & Co. thus obtained was the knowledge of Vere Somerset so as to cause this Court to find, within the meaning of section 6, Vere Somerset "instigated, requested, or consented in writing" to a breach of trust of which, as a matter of fact, he was ignorant.

For these reasons, in my judgment, this point fails the defendants, as also a similar one that was taken, that the knowledge of Lord Hill's agent, Haste, was the knowledge of Vere Somerset, which was

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founded upon the fact that at the plaintiff's request Haste wrote certain letters which were put in. In my judgment the trustees are not entitled to the relief Mr. Justice KEKEWICH gave them, for they have failed to establish the issue which was upon them, and as to this the learned Judge's judgment should be reversed, and consequently this appeal allowed upon this second point.

DAVEY, L.J., after examining the facts, continued: The learned Judge has held that the investment was a breach of trust, of which the children have a right to complain, and there is no appeal against that part of his judgment, and indeed it is difficult to see how he could have held otherwise, the only singularity of the case being that the trustees were advised by solicitors of the highest position, and by land valuers also of experience in their profession. But he has also held that Vere Somerset's action is barred by the Statute of Limitations, and that his life interest in the trust funds ought to be impounded to indemnify the trustees.

The learned Judge finds that Vere Somerset knew that the net income of the property was 1,070*l.* only. I confess that I can find no evidence to justify this finding. Haste (Lord Hill's agent) was dead at the time of the trial, Berger was not called, and Vere Somerset, although pressed on cross-examination, said that he did not know the income of the property, and that Haste had told him it was 1,700*l.*

It should be stated that at an early stage of the business Haste prepared a proposal which was sent to Vere Somerset, but it was not produced, and there was no clear evidence of its contents. We cannot, I think, properly on this evidence draw the inference that it contained a statement of the present income of the property.

The first question, therefore, which we have to decide is whether Vere Somerset's action is barred. I do not propose to add very much to what has been said by the other members of the Court. I do not think it makes any difference whether the trustees received the interest and paid it to Vere Somerset or whether they allowed him to receive it direct from Lord Hill, but I am of opinion it was not interest on the sum sought to be recovered in this action, and it appears to me that it would be almost an outrage on common sense

to treat the payment to Vere Somerset of the interest on the mortgage as an acknowledgment by the trustees of the existence of the debt sought to be recovered in this action. If it was evidence of anything, it was evidence of Vere Somerset's acquiescence and acceptance of the mortgage as a proper investment. I am therefore of opinion that on this point the learned Judge was right.

The other point appears to me to be one of greater difficulty. The answer to it depends on the construction of section 6 of the Trustee Act, 1888, and the application to be given to that section.

Undoubtedly the investment was made at the instigation, or request, or with the consent in writing of Vere Somerset. But I am of opinion that is not enough, and that in order to bring the case within the section the beneficiary must have requested the trustee to depart from and go outside the terms of his trust. It is not, of course, necessary that the beneficiary should know the investment to be in law a breach of trust, but he must, I think, know the facts which constitute the breach of trust. But supposing I am wrong in this, and that it should be held to be sufficient, in order to bring the section into operation, that the beneficiary requested or consented to the investment in question, it appears to me that we arrive at the same result from a consideration of the latter words of the section, which does not impose on the Court the duty in all events of impounding the interest of the beneficiary, but invests the Court with a discretionary power (to be exercised judicially), "if it shall think fit," to "make such order as to the Court shall seem just" for the purpose.

It appears to me that in coming to the conclusion of what is just the Court must have regard to settled legal principles. Although the power of impounding the interest of the beneficiary is extended by the section to new cases it is not a new power, and I cannot find any words in the section which have the effect of directing the Court to exercise the statutory jurisdiction on principles different from those on which it acted before the statute. The leading case on the subject is *Raby v. Ridehalgh* (6). Lord Justice TURNER's judgment did not go beyond holding that the tenant for life, having been privy and party to the breach of trust, was liable to recoup the trustees, and see *Sawyer v. Sawyer* (8). Was Vere Somerset either party or privy to this breach of trust? The case is undoubtedly

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very near the line. If I agreed with the learned Judge's view as to the facts of the case I should agree with his decision, but remembering that the trustees are in the position of actors seeking an indemnity from another against their own liability, I have come to the conclusion that there is not sufficient evidence that Vere Somerset knew of the insufficiency of the security, or that he ever desired, requested, or consented or was privy to his trustees stepping outside the terms of their trust. Why should he? He had to gain nothing himself, and his object was to have the funds securely invested. Wilde, Berger & Co.'s letter of 17 July, 1878, seems to me accurately to express Vere Somerset's attitude of mind as gathered from his correspondence and evidence. Their letter to Vere Somerset himself, of 10 July, 1878, was not calculated to inform him that a breach of trust was contemplated and to rouse his suspicion. It is true that the loan was afterwards increased to 35,000*l.*, and he was informed of this by the letter of 20 July, and on this point I have felt great difficulty, but I think he was entitled to assume from the terms of the letter that the trustees in having so arranged had done so on sufficient advice and with sufficient care. We were pressed to treat Berger's knowledge as Vere Somerset's, on the ground that it is admitted in the answer to interrogatories that to some extent the firm acted as his solicitors. But I do not think that there are any sufficient grounds on which we can affect Vere Somerset with Wilde, Berger & Co.'s knowledge, or, if he had no direct knowledge, hold that he had constructive notice—even assuming that constructive notice would be sufficient to affect him with liability.

On the whole, therefore, I am of opinion that on this point we must reverse the judgment of Mr. Justice KEKEWICH. The result will be that Vere Somerset will be entitled to receive the income of the funds realized from the security, but the trustees will retain for their own use the interest of the moneys paid by them to make good the deficiency of the mortgage.

Solicitors: *Pritchard, Englefield & Co.*, for *E. Bygott*, Wem,
Salop, for the Appellant.

Hulberts & Hussey, for the Respondents.

HILL v. WALLASEY LOCAL BOARD.

1893, Oct. 30, 31; Nov. 16. LINDLEY, A. L. SMITH, AND DAVEY, L.JJ.

Health—Water Supply—“Street”—Private Road—Local Authority having Control of Streets generally—Power to break up Private Road without Owner’s Consent—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 4, 16, 54, 57, 308—Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), ss. 28–34.

A private road is a “street” within the meaning of sections 16 and 54 of the Public Health Act, 1875.

The words “where the local authority have not the control of the streets,” in section 57 of the Public Health Act, 1875, are descriptive of and mean a local authority not having the control of the streets generally in its district—i.e. a local authority which is not the road authority.

The defendants, who had the powers of an urban sanitary authority with respect to the W. district, and the control of the streets generally in that district, and also the power of supplying the inhabitants with water, proceeded, without the plaintiff’s consent, to break up a private road belonging to the plaintiff, which was situate within their district, for the purpose of laying down water mains:—

Held (A. L. Smith, L.J., dissenting), that section 57 of the Public Health Act, 1875, incorporating section 29 of the Waterworks Clauses Act, 1847, which forbids the laying down of any pipe in any private land without the consent of the owner, did not apply to the defendants, as they were a local authority having the control of the streets generally in their district; that, under sections 16 and 54 of the Public Health Act, 1875, the defendants, as the local authority, had the power to carry the water mains through the plaintiff’s private road without his consent; and, consequently, that the plaintiff was not entitled to an injunction.

APPEAL by the defendants from a decision of Romer, J.

The plaintiff was the owner of certain lands in the district of the defendants, through which there passed a road known as Sea View Road. It was admitted on the hearing of the appeal that so much of this road as passed through the plaintiff’s lands was the plaintiff’s private road, and that there was no public right of way over it.

The defendants were the urban sanitary authority for the Wallasey district, and the local authority for supplying water in that district. In April, 1892, the defendants, without notice to the plaintiff, and without his consent, began breaking up a portion of this private road of the plaintiff for the purpose of laying down water mains to convey water for the benefit of the inhabitants of their district from a well which the defendants had sunk close to the

plaintiff's land, to another part of their district beyond the plaintiff's land. The plaintiff thereupon commenced an action against the defendants, and moved for an injunction to restrain them from digging any trenches in or otherwise disturbing the soil of his portion of the road. KEKEWICH, J., granted an interlocutory injunction,* and at the trial of the action ROMER, J., to whom the action had been transferred for trial, made the injunction perpetual, considering himself bound, under the circumstances, by the decision of KEKEWICH, J., on the interlocutory application.

The defendants appealed.

The private Acts affecting the defendant's rights are sufficiently dealt with in the judgment of LINDLEY, L.J.

Cozens-Hardy, Q.C., and *W. M. Cann*, for the appellants :

The road in question, although the plaintiff's private property, is a "street" within section 4 of the Public Health Act, 1875 : *Taylor v. Oldham Corporation* (1), *Midland Railway v. Watton* (2). The powers given by section 57 of the Act of 1875 are cumulative, and do not cut down the powers conferred by sections 54 and 16 of the same Act (3) ; see section 341 of the Act of 1875. Under section

* [1892] 3 Ch. 117 ; 62 L. J. Ch. 132 ; 67 L. T. 49.

(1) 4 Ch. D. 395, 408 ; 46 L. J. Ch. 105 ; 35 L. T. 696 ; 25 W. R. 178.

(2) 17 Q. B. D. 30 ; 55 L. J. M. C. 99 ; 54 L. T. 482 ; 34 W. R. 524.

(3) By section 4 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), "street" (if not inconsistent with the context) is defined as including "any highway (not being a turnpike road) . . . and any road, lane, footway, square, court, alley, or passage, whether a thoroughfare or not."

By section 54, "Where a local authority supply water within their district they shall have the same powers and be subject to the same restrictions for carrying water mains within or without their district as they have, and are subject to, for carrying sewers within or without their district respectively by the law for the time being in force."

By section 16, "Any local authority may carry any sewer through, across,

or under any turnpike road, or any street or place laid out as or intended for a street."

By section 57, "For the purpose of enabling any local authority to supply water there shall be incorporated with this Act the Waterworks Clauses Act, 1863, and the following provisions of the Waterworks Clauses Act, 1847, namely, 'With respect (where the local authority have not the control of the streets) to the breaking up of streets for the purpose of laying pipes.'"

The provisions in the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), with respect to the breaking up of streets for the purpose of laying pipes are contained in sections 28-34 of that Act. Section 28 enacts that "the undertakers, under such superin-

276 of the Public Health Act, 1875, the defendant board as a rural authority have been invested by the Local Government Board with the powers of an urban authority; and having the powers of an urban authority, they have the powers of surveyors of highways under section 144, and the control of the highways is vested in them under section 149. The defendant board is therefore the local authority having control of the streets generally in their district; and the restrictive provisions in the Waterworks Clauses Act, 1847, are not applicable (3).

Neville, Q.C., and *W. D. MacConkey*, for the respondent, the plaintiff:

The defendants really want to get the plaintiff's road for a public road without paying for it. This road is not a "street" within the powers conferred by sections 16 and 54 of the Act of 1875. "Street" in section 16 means a road running in front of a line of houses. *Coverdale v. Charlton* (4) is distinguishable, as there the road was a public road repairable by the inhabitants at large. Sections 16 and 54 are controlled by section 57, which incorporates sections 28-34 of the Waterworks Clauses Act, 1847, which restrict the defendants breaking up this private road without first obtaining the consent of the owner, the plaintiff. Section 149 of the Public Health Act does not give the defendants the control of this street,

tendence as is hereinafter specified, may open and break up the several streets within the limits of the special Act and lay down and place within the same limits pipes and do all other acts which the undertakers shall from time to time deem necessary for supplying water to the inhabitants of the district doing as little damage as can be and making compensation for any damage which may be done." Section 29 enacts that "nothing herein contained shall authorize or empower the undertakers to lay down or place any pipe

. . . . or other work in any land not dedicated to public use without the consent of the owners and occupiers thereof." Section 30 enacts that "before the undertakers open or break up any street they shall give to the persons under whose control or management the same may be notice in writing of their intention to open or break up the same." Section 31 enacts that "no such street shall be opened or broken up except under the superintendence of the persons having the control or management thereof or of their officer."

(4) 3 Q. B. D. 376; 47 L. J. Q. B. 446; 38 L. T. 687; 26 W. R. 687; *affd.* on appeal, 4 Q. B. D. 104; 48 L. J. Q. B. 128; 40 L. T. 88; 27 W. R. 257.

because that section only relates to streets repairable by the inhabitants at large, and this is not so repairable.

They referred to *Robinson v. Barton Local Board* (5).

Cozens-Hardy, Q.C., replied.

Cur. adv. vult.

November 16.

LINDLEY, L.J.: This is an appeal by the defendants against an injunction restraining them from breaking up a private road belonging to the plaintiff, and from laying water mains along the same. The defendants at one time asserted that the road was a public road, but this point was decided against them, and it is now conceded that the road is the plaintiff's private property, and that there is no public right of way over it.

The defendants are the Urban Sanitary Authority for Wallasey, in Cheshire, and by various private Acts they are empowered to supply the inhabitants of that district with gas and water. By a provisional order made in 1853 and confirmed by the statute of 16 Vict. c. 24, the Public Health Act, 1848 (except sections 50–109), and portions of the Towns Police Clauses Act (10 & 11 Vict. c. 89), and of the Towns Improvements Clauses Act (10 & 11 Vict. c. 84), were made applicable to the defendants' district. By these Acts the defendants acquired the control and management of the public streets within their district, and some powers over private streets were conferred by later statutes: see the Wallasey Improvement Acts of 1864 (sections 29 to 84) and 1867 (sections 2, 6, 15, 16). By a private Act passed in 1858 (21 & 22 Vict. ch. lxiii.) the defendants obtained power to supply the inhabitants of their district with gas and water. This Act incorporated the Lands Clauses Consolidation Act, 1845, and the Waterworks Clauses Act, 1847 (except sections 75 to 83), and for the purposes of affording such supply the defendants were to be treated as "undertakers" and "promoters of the undertaking" within the meaning of those Consolidation Acts.

The plaintiff's road is within the defendants' district. But the road being a private road the defendants had no power under any of the Acts as yet referred to, to break it up without his consent. Their power to take the road compulsorily under the Lands Clauses

Act expired long ago, and could not now be exercised, even if they desired to exercise it, which, however, they do not, and never did.

The defendants, as I understand, admit all that I have stated to be true. They contend, however, that they have the power to break up the road and to lay water mains in and under it without the plaintiff's consent by reason of the powers conferred on local authorities by the Public Health Act, 1875, which I now proceed to examine. Having regard to the definition clause in the Public Health Act, 1875 (section 4), and to previous decisions upon it the plaintiff's road is, in my opinion, a "street" within the meaning of that Act. Section 16 authorises the defendants to lay sewers along "streets" and other places. Section 54 authorises them to lay water mains to the same extent as they are authorised to lay sewers. The powers conferred by those sections are far greater than any conferred by the defendants' private Acts and the Acts incorporated with them. There is a compensation clause in the Public Health Act, 1875 (section 308), which entitles the plaintiff to compensation for any injury he may sustain by the exercise of the powers thus conferred on the defendants. Now, unquestionably, if there were nothing more in the Act of 1875 these sections would justify the defendants in laying water mains along the plaintiff's road without his consent, but on the terms of making him compensation for any damage he might sustain by their so doing. But the plaintiff contends that section 54 is controlled and cut down by section 57, and the case really turns upon this point. Section 57, it will be observed, is an enabling section and not a restricting section; and an enabling section—i.e., a section conferring additional powers on those who want them—ought not to be construed as a disabling section, or as restricting more extensive powers conferred by other sections of the same or any other statute. Moreover, by section 341 of the Act of 1875, the powers conferred on local authorities by the Act in question are expressly declared to be in addition to any other powers they may have. But under their private Acts and the Acts incorporated therewith the defendants can lay down water mains in the plaintiff's road with his consent, and they do not require the aid of section 57 of the Public Health Act of 1875 to enable them to exercise the power therein mentioned. The defendants are in this position. They do not want to invoke

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section 57, but they want the additional powers conferred on them by section 54. The combined effect of the special Acts and of sections 16, 54, 308, and 341 of the Public Health Act, 1875, is, in my opinion, to empower the defendants to lay water mains along the plaintiff's road, making him all proper compensation for any injury they may do to him.

Much of the discussion before us was addressed to the meaning in section 57 of the words "where the local authority have not the control of the streets." These words appear to me to have the same meaning as similar words have in those sections of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), which relate to the breaking up of streets by public authorities—viz., sections 28 to 34. In those sections the expression "persons having the control of the streets" is apparently used by way of contrast to "owners and occupiers," and the streets referred to as under control are apparently public streets and roads, and not private property over which there is no public right of way. (See the definition of "street" in section 2 of the Waterworks Clauses Act, 1847.) If this be so, the defendants are a local authority having control of the streets within the meaning of those words, and the restriction, if any, imposed by section 57 does not apply to them. The restriction placed by that section on those local authorities, if any, who fall within section 54, but have not control of the streets, cannot, in my opinion, apply to the defendants, who are a local authority having control of the streets.

Were it not for the compensation clause (section 308) the construction which I put on the Public Health Act, 1875, would lead to great injustice, and this circumstance would afford a strong argument against such construction. But, having regard to the compensation clause, no injustice is done to the plaintiff, and no reason based on injustice can be urged in favour of the construction contended for by him. The appeal ought to be allowed and the action dismissed.

A. L. SMITH, L.J.: The question in this case depends upon the construction of some sections of the Public Health Act, 1875, and of the Waterworks Clauses Act, 1847, incorporated

therewith, the point being whether the Wallasey Local Board are entitled to enter upon land which is the private property of the plaintiff undedicated to the public use, and lay water mains and pipes therein without his consent. Mr. Justice KEKEWICH, on an interlocutory motion, and Mr. Justice ROMER, at the trial, held that the defendants were not so entitled, and the defendants appeal.

By section 54 of the Act of 1875 it is enacted "that where a local authority supply water within their district"—this is what the Wallasey Local Board are, and do—"they shall have the same powers and be subject to the same restrictions for carrying water mains within or without their district as they have and are subject to for carrying sewers within or without their district." By section 16 of this Act any local authority may carry a sewer through, across, or under any street or place laid out or intended for a street. Section 4 enacts that the word "street," if not inconsistent with the context, includes any road, lane, or passage, whether a thoroughfare or not; and it has been held by authority which cannot in this Court be questioned that the word "street" in the Act includes any road, lane, or passage, whether public or private property. (See the judgment of Jessel, M.R., in *Taylor v. Oldham Corporation* (1), approved of in this Court in the case of the *Midland Railway v. Watton* (2).)

In these circumstances it appears to me that the land belonging to the plaintiff through which the local board are proposing to carry the water mains is a "street" within the meaning of the Act of 1875, and that if it were not for section 57 of this Act, which I have now to consider, the board could do what it proposes, without the consent of the plaintiff. Sections 16 and 54, however, cannot, in my judgment, be read alone; they must be read in conjunction with section 57. If the local board require, as they do, the enactments in section 54, they must take the section coupled with section 57. It will be noticed that sections 54 and 57 are part of a group of sections commencing at section 51 and ending at section 70, in the Act of 1875, under the heading of "Powers of Local Authority in Relation to supply of Water." When sections 16, 54, and 57 are read together they read as follows: "Where a local authority supply water they may carry a water main across or under any street or place laid out or intended for a street and for

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this purpose"—this is how I read the words, "for the purpose of enabling" in section 57—"there shall be incorporated into this group of sections those provisions of the Waterworks Clauses Act, 1847, which relate: (a.) to the breaking up of streets for the purpose of laying pipes; (b.) to the communication pipes to be laid either by the undertakers or by the inhabitants; (c.) to waste or misuse of the water supplied; (d.) to the provision for guarding against fouling the water; and (e.) to the payment and recovery of water rates." Upon referring to section 57 it will be seen that these provisions of the Waterworks Clauses Act, 1847, with the exception of the provision relating to the "breaking up of streets," are incorporated without any restriction whatever, whereas the provision relating to "breaking up of streets" is only to apply to those local authorities which have not the control of the streets; and consequently if they have such control this one provision is not wanted, and, therefore, is not to apply. The real point in the case is, What is the true reading of the words "where the local authority have not control of the streets" in this section? The incorporated sections of the Act of 1847, which relate to the breaking up of streets, enact that the undertakers (that is, the persons proposing to break up a street for the purpose of laying down water pipes) shall not break up any street except under the superintendence of the persons under whose control and management such street shall be; and impose penalties if this be done, and also provide for the reinstatement of the street broken up; and every undertaker (by section 29) is expressly prohibited from laying down any water-pipe in any land not dedicated to public use without the consent of the owners and occupiers thereof.

It is said by the appellants that—inasmuch as they have the control of the streets generally in their district, though not of this particular road in which they are proposing to lay water pipes, for that is the private property of the plaintiff, undedicated to public use—they are not a local authority which "have not the control of the streets" within the meaning of section 57 of the Act of 1875, or, in other words, that they are the local authority which have the control of the streets within the meaning of the section, and therefore the incorporated sections about "breaking up streets," which

include the 29th section, do not apply to them. They point to the words at the commencement of this section 57, and assert that it is an enabling and not in any way a disabling section. I agree that this section and those incorporated with it are in the main enabling sections; but when a portion of one Act is incorporated with another the whole of the incorporated portion, whether it be enabling or disabling, must in my judgment be read together. The real question, as before stated, is, What is the true reading of the words in section 57, "where the local authority have not the control of the streets"? They can only mean one of two things—either, where the local authority have not the control of the streets in their district generally; or where the local authority have not the control of the streets about to be broken up. If it means the first, as the appellants contend, what is the local authority pointed at which has not the control of the streets in their district generally? It cannot be an urban sanitary authority, for they have the control of all streets in their district which are highways repairable by the inhabitants at large (section 149). An urban sanitary authority, therefore, is not a local authority, which has not the control of the streets generally. Nor can it, in my judgment, be a rural sanitary authority. Section 54 of the Act of 1875, which is the section dealing with the laying down of water-pipes, applies equally to rural and urban sanitary authorities, for section 4 enacts that if not inconsistent with the context the expression "local authority," which is that used in section 54, means urban and rural sanitary authorities; and there is no context to the contrary. Moreover, why should a rural sanitary authority be unable to lay down water-pipes on private land without the consent of the owner if an urban sanitary authority, as the appellants contend, can do so? No answer was given to this, nor do I apprehend that any can be given, for there is no warrant for saying that a rural sanitary authority is in a different position to that of an urban sanitary authority when they desire to lay down water-pipes. This difficulty faces the appellants upon their construction of section 57, and it certainly seems to me that they have been unable to surmount it, not being able to point to a single local authority to which the words in section 57 can be held to apply, if the section be read as they read it. It appears to me, for the reasons I have given, the appel-

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lants cannot avail themselves of a rural sanitary authority to get themselves out of the difficulties they are landed in, upon their reading of the section.

If, however, the other reading be correct, which is the respondent's reading, viz., "Where the local authority have not the control of the streets *about to be broken up*"—no difficulty arises. Both urban and rural sanitary authorities, which are the two authorities mentioned in section 54, which is the section dealing with laying water pipes, will be included, and everything will run smoothly. The incorporated sections deal with streets proposed to be broken up, and not with streets in general, in a district, and in these circumstances I ask, Why are not the incorporated sections still to apply? The urban or rural sanitary authority, not having the control of the streets about to be broken up, are in the same position as any other undertakers proposing to lay down water-pipes who have no control over the *locus in quo*, and consequently before they break up such streets they must give to the person under whose control and management these streets are, the notice provided by the incorporated sections, and also, as they have no control over them, they must obtain the consent of the owners and occupiers. It will be noticed that the Wallasey Local Board, under their private Act of 1858, are entitled to payment for the water they supply.

In my judgment it is only when a local authority, be it rural or urban, have the control of the street about to be broken up that the incorporated sections, which apply to the "breaking up of streets," can be dispensed with. This reading of section 57, which, in my opinion, is the correct one, avoids all difficulties, and seems to me to be eminently reasonable. It does not appear to me that the compensation section in the Act of 1875 (section 908) affords any real clue to the construction of section 57. The local authority have or have not the power to enter upon private property undedicated to public use, to lay water-pipes without the consent of the owners and occupiers. It is true that it would be most unreasonable if they could do so without making compensation, but still the question remains, Does the Act empower them to do so? In my judgment it does not, and for the above reasons I come to the conclusion that the judgment of Mr. Justice ROMER should be affirmed.

Being of opinion that this is the true reading of section 57 of the Act of 1875, the point raised by the appellants upon section 341 does not arise. I have striven to adopt the views of my brethren in the case, but I have been unable to do so. I know that I may well be wrong, but having formed the opinion I have, I am bound to express it. I think the appeal should be dismissed.

DAVEY, L.J.: In this action the plaintiff seeks to restrain the local board from laying water-pipes under a certain road, called Sea View Road, without his consent. The defendants in the Court below contended that the piece of land in question is a public road; but before us they admitted (for the purpose of argument, at least) that it is the plaintiff's private road. They claim the right to lay their water-pipes in it under certain sections of the Public Health Act, 1875, and the question is whether they have such a right without the plaintiff's consent. [The LORD JUSTICE then read section 54 of that Act, and proceeded:] The powers of the local authority to carry sewers are given by section 16 of that Act. [The LORD JUSTICE read the section and continued:] This power is very extensive. It enables the local authority to carry their sewer under any "street" within their district without any notice or consent, and under any lands within their district upon giving notice, if, on the report of the surveyor, it appears necessary. What is a "street"? By section 4 of the Public Health Act, 1875, it is enacted that in this Act, if not inconsistent with the context, the following words and expressions have the meanings assigned to them; and it is then enacted that the word "street" includes any road, lane, &c., whether a thoroughfare or not: see *Coverdale v. Charlton* (4). The word "street" in this section has been held to include a country lane, though not a street in the ordinary acceptance of the word; and the same meaning has been put upon the word as used in the Public Health Act, 1875, in subsequent cases, of which *Fenwick v. Croydon Rural Sanitary Authority* (6), is the most recent. In *Taylor v. Oldham Corporation* (1), JESSEL, M.R., held that the word "streets" in this Act clearly extends to places which are in all respects private, and over which the public have no rights. It is to be observed that this case was a decision on sec-

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tion 16 of the Act. In *Midland Railway v. Watton* (2), the decision in *Taylor v. Oldham Corporation* (1) was adopted in the Court of Appeal. I can find no context, either in section 16 or in section 54, inconsistent with our attaching the widest meaning to the word "street," and I am therefore of opinion that, as the local authority could carry their sewers under this road without any consent, so, if the matter rested there, they can, under section 54, carry their water mains under it also.

But it is said that section 57 restricts or qualifies the powers given by section 54. One must therefore examine that section and the relevant sections of the Acts of Parliament referred to in it. The first observation to be made is that section 57 is an enabling, and not a restrictive, section, but I agree that all the provisions in this group of sections must be read together, and if, according to the true construction of section 57, it has the effect of restricting the powers conferred by the earlier section, we must give that effect to it. The important words for the present purposes are, "With respect (where the local authority have not the control of the streets) to the breaking up of streets for the purpose of laying pipes." The clauses of the Waterworks Clauses Act, 1847, referred to in these words are sections 28 to 34. These sections are framed on the assumption that the "undertakers" (as they are termed) have not the control or management of the streets, and accordingly certain provisions are made for notice being given to the persons having such control or management and for payment of penalties to such persons in case of non-compliance with the provisions of the Act. What is the meaning of the words "where the local authority have not the control of the streets" in section 57 of the Act of 1875? Does it mean have not the control of the particular street or streets in question in any case; or are the words used in order to define the character or description of local authority to which the clauses are made applicable, as one not having control of streets generally, or, in other words, not being a road authority? In my opinion this is the crucial point for the decision of this case. I am of opinion that the latter is the true construction of the words, and that the meaning and intention of the section is to bring into operation, in the case of a local authority which is not itself the road or street authority, the

obligation of doing the work under superintendence of the road authority and to bring into operation the other restrictions contained in the Waterworks Clauses Act and the correlative power of the road authority to superintend the execution of the work. If this be the correct interpretation of the statute, it follows that the portion of section 57 relied on does not apply to the Wallasey Local Board, which is an authority having the control of the streets, and their general power under section 54 is not curtailed or cut down by anything in section 57; it might be sufficient to say that I find a power given in plain words in section 54, and I do not think that the plaintiff has shown sufficient grounds for qualifying or restricting the exercise of the power thus plainly given.

I am therefore of opinion that the judgment of the learned Judge should be discharged and the action dismissed. This is, of course, without prejudice to any claim of the plaintiff for compensation under section 308, though it is not, in my opinion, necessary to express this in the order.

Solicitors: *Frith Needham*, for *W. Danger*, Egremont.

Brook, Freeman & Batley, for *Wright, Becket & Co.*,
Liverpool.

INDUSTRIAL AND GENERAL TRUST v. SOUTH
AMERICAN AND MEXICAN CO.

1898, November 8, 9. LINDLEY AND A. L. SMITH, L.JJ.

Company—Winding up—Debenture-holders' Action—Receiver—Exceptional Assets—Realization.

After the presentation of a petition by a creditor to wind up a company, an action was commenced by debenture-holders to enforce their security, and a winding-up order was made. The assets of the company pledged to the debenture-holders were of an exceptional character, and could not be easily and conveniently realized by a mere official of the Court, but required a person in touch with the financial world with a special knowledge of the securities to deal with them satisfactorily :

The Court appointed a receiver on behalf of the debenture-holders in respect of these particular securities, leaving the official receiver in the winding up to be receiver of all the rest of the assets.

APPEAL from an order of Vaughan Williams, J.

This was an appeal on behalf of certain debenture-holders against an order appointing the liquidator of the South American and Mexican Company receiver of certain securities pledged to the debenture-holders and of the uncalled capital.

On 24 July, 1898, a petition was presented by a creditor for the winding up of the South American and Mexican Company. The South American Company had issued a great number of debentures in five series. The action was brought on behalf, not of all the debenture-holders, but of those who held the first and second issues, the subsequent debenture-holders not being represented at all. It appeared that the writ issued on 26 July, 1898, was in the form of a common debenture-holders' action, except that it was not on behalf of all the debenture-holders. On 2 August the usual winding-up order was made. One Touch was appointed receiver in the debenture-holders' action, but on 25 October the order appointing him receiver was discharged, and the official receiver, who had the conduct of the winding up, was appointed receiver in his stead. It appeared from the affidavits filed that the securities of the company pledged to the debenture-holders were of a peculiar character, and could not be realized satisfactorily by the official receiver. The application before the Court was to discharge that order and appoint Touch receiver in the place of the official receiver.

Sir Henry James, Q.C., Moulton, Q.C., and Elgood, for the appellants, debenture-holders in the defendant company, referred to *In re Joshua Stubbs, Limited* (1) and *Strong v. Carlyle Press* (2).

Everett, Q.C., and Howard Wright, for the official receiver, referred to *In re Henry Pound, Son, & Hutchins* (3) and the Companies (Winding-up) Act, 1890 (53 & 54 Vict. c. 63), ss. 4, sub-s. 6, 9, sub-s. 1 ; 23, sub-s. 1.

Kirby, for the trustees of the debenture trust deed.

Sir H. James, Q.C., in reply, referred to *Fowler v. Broad's Patent Night Light Co.* (4).

LINDLEY, L.J.: [His Lordship, after stating the facts set out above, continued:] The judgment of Mr. Justice VAUGHAN WILLIAMS was read in the course of the argument, and I will content myself with saying that it appears to me he proceeded upon right principles from first to last. He started with the unquestionable law and practice that if you can avoid having two receivers the Court ought to do it. He started with the view which was expressed by Lord Justice GIFFARD in *Perry v. Oriental Hotels Co.* (5), and which was reiterated and affirmed in the Court of Appeal in the case of *In re Joshua Stubbs, Limited* (1) and in *Strong v. Carlyle Press* (2). But although it is quite true that, unless there are reasons to the contrary, it is extremely undesirable, and a mere waste of assets and a public inconvenience and injustice, to have two or three persons winding up a company, there can be no objection under ordinary circumstances to appointing the official liquidator receiver for the debenture-holders, so as

(1) [1891] 1 Ch. 187; 63 L. T. 619; 39 W. R. 200, affirmed [1891] 1 Ch. 475; 60 L. J. Ch. 190; 64 L. T. 306; 39 W. R. 617.

(2) 2 R. 283; [1893] 1 Ch. 268; 62 L. J. Ch. 541; 68 L. T. 396; 41 W. R. 404.

(3) 42 Ch. D. 402; 58 L. J. Ch. 792; 62 L. T. 137; 38 W. R. 18.

(4) 3 R. 295; [1893] 1 Ch. 724; 62 L. J. Ch. 373; 68 L. T. 576; 41 W. R. 247.

(5) L. R. 5 Ch. 420; 23 L. T. 525; 18 W. R. 779.

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to protect their interests. When that is done the debenture-holders really have nothing to complain of except this, that their particular nominee is not appointed. When you reduce the controversy between the debenture-holders and the shareholders and the other creditors to a question of the person who is to be the receiver—not a question whether he is to be a receiver for the debenture-holders or not—the question who the receiver is to be assumes a totally different aspect. The debenture-holders are entitled to a receiver. That right has been recognized by the learned Judge below in this case. It was overlooked by him in *Strong's case* (2), but it has been recognized in this case; and they have a receiver.

Now, although I think the decision of the learned Judge below in this case was right on the principles on which it proceeded, unquestionably the evidence in this case does raise a difficulty. It is a very peculiar case, because the evidence which has been adduced in this Court since the case was heard before Mr. Justice VAUGHAN WILLIAMS has drawn pointedly to our attention the fact that the great mass of the assets of this company which are pledged to the debenture-holders are of such a nature that it is difficult to suppose that they can be realized in the best way for the debenture-holders by a mere official of the Court. I say that without in any way disparaging the particular official receiver in this case. But there are certain things which it is extremely difficult for him or for anybody else to do who is not in touch with the financial world. When I look at the assets specified in the lists A and B appended to Mr. Trotter's affidavit, I confess I am very much struck with the peculiar nature of those assets and the extreme difficulty in a businesslike point of view of realizing them.

That being so, the question is what ought to be done. Several courses are open to the Court. Sometimes one course will be more expedient than another. Counsel for the official receiver quite rightly drew our attention to the Act of 1890, and pointed out that Parliament has by that Act very considerably modified the law relating to the winding up of companies. It has, for reasons which commended themselves to Parliament, placed the winding up of companies more or less under the Board of Trade, and has

assimilated to a certain extent the winding up of companies to the proceedings in bankruptcy, and put them under one official department. The machinery employed by the Act is defective, and has been known to be defective ever since the Act was passed. In passing the Act of Parliament provision was not made for that which is now, practically speaking, the common form of winding up, which is a debenture-holders' action. The constitution of companies has so changed within the last twenty-five years that nothing is more common now than for a liquidator of a company to have next to nothing to do, and the real winding up is done by the receiver in the debenture-holders' action. If the Companies Act of 1890 is looked at it will be found that the blot or defect in the machinery has not been cured—that is to say, the machinery of the Act is such that it cannot be easily applied to debenture-holders' actions. The mischief has been met partially by transferring the debenture-holders' action to the Judge who has the conduct of the winding up of the company, and unquestionably, whatever course the Court may take in dealing with debenture-holders' actions in the winding up, it ought not to overlook the extreme importance of having no conflict of jurisdiction, and no conflict between the debenture-holders' receiver on the one hand and the official receiver on the other.

Now, having made those preliminary remarks, what course can the Court take? One course to take is that suggested by the appellants—that is to say, place the whole of this winding up in the hands of the receiver of the debenture-holders. I do not think that is required in the interests of the debenture-holders, and I do not think it would be right. Another course is to let this motion stand over to have another meeting of the debenture-holders convened, and take their views as to whether they would desire these particular assets to be realized by a gentleman chosen by themselves. If I thought there was any doubt about what those views were, I should probably suggest to my learned brethren that that would be the right course to be pursued; but, having regard to what took place yesterday, and to the readiness and willingness of the plaintiffs to turn this action into an action on behalf of all the debenture-holders, and having regard to what we have heard, I am satisfied that if the other debenture-holders were consulted they would also desire that

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Touch should realize these exceptional assets. Another course is to appoint Touch joint receiver with the official receiver. I doubt whether that would be so judicious and work so easily and so inexpensively as the ultimate course which I will mention presently, and which I think is the right one. The right course, I think, is this: to appoint Touch receiver of these particular securities—that is to say, of the bonds and shares and debentures and stocks in the lists A and B, leaving the official receiver receiver of all the rest of the assets, the uncalled capital and everything else. Nothing can possibly be gained by handing over to the receiver of the debenture-holders those ordinary duties which the official receiver is daily in the habit of performing. He is by far the best man to make calls and get in assets. But these particular assets are of a totally different class. I may say that, after having seen those affidavits which have been filed since the case was before Mr. Justice VAUGHAN WILLIAMS, we have been in communication with him, and the order which we propose to make has his assent. The order is this: The plaintiffs undertaking to amend the writ so as to make the action one on behalf of all the debenture-holders, vary the order. Appoint Touch, on giving security, receiver only of the shares and stocks, bonds and debentures mentioned in the lists A and B referred to in Mr. Trotter's affidavit, with power to realize the same by sale or otherwise, and with liberty to apply to the Judge in Chambers for leave to institute in the name of the company such legal proceedings, if any, as may be necessary for that purpose.

I see that the order of Mr. Justice VAUGHAN WILLIAMS appoints the official receiver receiver and manager. That is very unusual, and I see no necessity for making Touch manager. He ought to be appointed receiver with the powers I have mentioned. Then appoint the official receiver receiver only of the other assets of the company. That will enable him to wind up the company and get in all the assets which do not require the special attention to which I have alluded.

A. L. SMITH, L.J.: This is an appeal from the judgment of Mr. Justice VAUGHAN WILLIAMS, by which he discharged an order

appointing Touch receiver and manager on behalf of the debenture-holders, and in his place appointed the official receiver. The question is, whether upon the facts as they now appear before this Court (which I may say are not the same that appeared before Mr. Justice VAUGHAN WILLIAMS) that order should stand, or whether it should be varied.

Now, no one cavils at the judgment of Mr. Justice VAUGHAN WILLIAMS with regard to the law that he laid down, or with regard to the rule which he extracts from the cases which have been decided. That rule, as he enunciated it, is this: that where the duties to be performed by the liquidator and the receiver will be identical, and such as should be performed by one person, the Court (if nothing more appears) will generally appoint the liquidator to perform those duties; the reason being that, if that were not so, there would be two persons engaged in the winding up of the company, which would cause additional expense, and would cause conflict between the two. Now, my learned brother Mr. Justice VAUGHAN WILLIAMS having laid down the rule accurately, then made this statement. He says: "It does seem to me that wherever there is a business to be carried on, wherever there are commercial transactions to be entered into, wherever there is buying and selling, wherever there is borrowing of money necessary in order to put the property to be administered in such a condition that it can be taken into the market—in all these cases, and in many other similar cases, the official receivers cannot, in the nature of things, perform their duties nearly so well as a commercial liquidator can do; and if I thought here that there was something in the nature of these securities to be realized and these moneys to be collected which required negotiations and bargainings and compromises, I should think that that was a function much better performed by an accountant than by an officer of the Court, even though assisted by a great department like the Board of Trade." With that statement I entirely concur. Do not let it be thought from anything which fell from me yesterday, and certainly not from anything which falls from me to-day, that I in any way doubt the capacity of the particular official receiver to act as such. We have all known him for many years, and we have felt him to be

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a gentleman perfectly competent to fill the position he now holds. That is not the question we have to determine. Then my brother Mr. Justice VAUGHAN WILLIAMS goes on: "But I have looked at this list of securities, and I am not at all satisfied that that is the nature of the securities. With regard to the Murrieta securities, inasmuch as that estate is, as I understand, in liquidation in another Court, it is plain that the only duty of the receiver, whoever he is, will be to receive such moneys as may be ordered to be paid to him in the administration by the Court. With regard to the investments, I have looked at the list of them, and they may or may not be Stock Exchange securities, but still it does not seem to me they are securities with regard to which there is anything else to be done than to employ a broker to sell them. Inasmuch as there are here no bargainings, no negotiations, and no compromises, and no buying and selling out of the ordinary way, I think the official receiver is a competent person (applying the rules I have before enumerated) to carry on these transactions."

But when the case comes before us, it appears from the affidavit of Mr. Trotter and from the affidavit of Mr. Mitchell Henry that these peculiar and out-of-the-common securities could not be sold by the employment of a broker to sell them. That is distinctly stated in the affidavit of these two gentlemen. Now, are those affidavits contradicted by the official receiver? It seems to me that they are not, but, on the contrary, they are acquiesced in, because the official receiver, in answer to those affidavits, says, in effect, this: "It is quite true that I am not going to employ any brokers, I am going to sell them, not through the ordinary channel of employing a broker, but in some other way, and I shall take advice of certain other gentlemen who are in my office as to what is the best way and the best plan of realizing those securities." So that it must be noticed that the official receiver in no way contradicts the affidavits of Mr. Trotter and Mr. Mitchell Henry, but he confirms them, because he says: "I am not going to employ a broker to sell." What is the meaning of that? Simply that it is not the proper way, and that they cannot be sold as ordinary securities are sold on the Stock Exchange.

That alters the facts of this case from those that appeared when the case was before Mr. Justice VAUGHAN WILLIAMS, and it seems to me that this case comes now within the first limit of his proposition, namely, that this is a case in which there are "compromises, bargainings, and negotiations;" and it is perfectly clear from the judgment of Mr. Justice VAUGHAN WILLIAMS (and I have had the opportunity of speaking to him myself about it) that if the facts now show that there must be (to use his own words) bargainings, negotiations, and compromises, the official receiver (not doubting for a moment his capacity as official liquidator) is not the best person to realize the securities.

But it is said, suppose that is so, in this case he ought nevertheless to be allowed to realize these securities, because there is no danger to these debenture-holders; to put it shortly, that there is such a large margin in the estimated assets that even assuming what the debenture-holders fear, that these assets will not be realized to the best advantage, even if they were not realized to the best advantage there is plenty to cover these debenture-holders; and they ought not, therefore, to make this application to the Court; but if we allow, as we do allow, the subsequent debenture-holders, the third, fourth, and fifth, to be added as plaintiffs in this action, it appears to me that there is such a small margin that there is danger to the debenture-holders (if these securities are not realized to the best advantage) that they may not be wholly covered (6).

For these reasons, it appears to me, therefore, that the order of Mr. Justice VAUGHAN WILLIAMS should be varied.

There was one other point made on the Winding-up Act of 1890. It was said on behalf of the official receiver, "Why do the debenture-holders want a receiver of their own when there is a committee of inspection appointed to see that the winding-up is done to the best advantage of everybody?" The answer to that is this: "It is quite true that a committee of inspection is appointed, but as regards the component parts of that committee the persons

(6) On 14 December it was mentioned by *Mr. Moulton* to the Court that certain debenture-holders objected to being made plaintiffs—to being repre-

sented by the plaintiffs—and it was proposed to add them as defendants, which the Court said might be done.

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who are to be the representatives of the debenture-holders have no voice at all, because they may be ruled out."

It seems to me, therefore, that in this case the order of my brother VAUGHAN WILLIAMS should be varied in the way that has been read by Lord Justice LINDLEY.

Order varied.

Solicitors: *William A. Crump & Son*, for the Debenture-holders.
Freshfields & Williams, for the Official Receiver.
Ashurst, Morris, Crisp & Co., for the Trustees of the
 Debenture Trust Deed.

IN RE BUCKLE, WILLIAMS *v.* MARSON.

1893, December 6. LINDLEY, A. L. SMITH, AND DAVEY, L.JJ.

*Will—Construction—Annuities—“Clear of all Deductions except Income Tax”—
 Codicil—“Free of Legacy Duty and every other Deduction.”*

A testator, by his will, gave his real and residuary personal estate to trustees upon trust (*inter alia*) to pay certain annuities, including one to the plaintiff, “all the said annuities to be paid clear of all deductions whatsoever except income-tax”; and, by a codicil, directed “that every legacy and other interest as well derivable under my will or any codicil thereto shall be free of legacy duty and every other deduction”:—

Held, that the plaintiff's annuity was payable free of income-tax.

APPEAL from a decision of North, J.

The plaintiff, Alice Williams, the wife of Frederick Sims Williams, was one of the children of William Boyd Buckle, a brother of the testator, Henry Buckle.

By his will, dated 16 February, 1877, the testator devised and bequeathed all his real and all his residuary personal estate to the defendants upon trust for sale, conversion, and investment, and out of the annual income of such investment to pay certain annuities, including an annuity to a child (other than the plaintiff) of the testator's brother, W. B. Buckle; the will then proceeded as follows: “And to such of the other children of my said brother William Boyd Buckle”—*i.e.* including the plaintiff—“as and when they

shall respectively attain the age of twenty-one years or be married, an annuity of 100*l.*, to continue payable until the time when, under the directions and bequests hereinafter contained, the legacies or shares hereinafter given to them respectively will become payable, all the said annuities (except where otherwise directed) to be paid clear of all deductions whatsoever except income tax, by equal half-yearly payments, the first of such payments to be made at the expiration of six calendar months from the date of my decease, or other the time of their respectively becoming payable."

The time when, under the directions and bequests thereafter contained, the legacies and shares thereafter given to the other children of W. B. Buckle would become payable had not yet arisen, and as regarded the annuities, there was nothing in the will contained whereby they were directed to be paid otherwise than clear of all deductions whatsoever except income tax.

The testator made a codicil to his will, dated 4 July, 1879, not material to the purposes of this report. He made a second codicil, dated 8 February, 1882, whereby he directed as follows: "And I expressly direct that every legacy and other interest as well derivable under my will or any codicil thereto shall be free of legacy duty and every other deduction."

The testator died before 28 November, 1886, and his will and codicils were duly proved.

The plaintiff, Alice Williams, then A. T. Buckle, attained the age of twenty-one years on 28 November, 1886, and was married to F. Sims Williams on 1 August, 1889.

Since the plaintiff attained the age of twenty-one years, the trustees of the testator's will had always paid her the annuity of 100*l.* in full, without any deduction on account of income tax or otherwise, but now threatened to deduct income tax from future payments of the annuity, and also to deduct from future payments a sum equal to the total amount of the income tax upon the annuity already paid.

On 21 April, 1893, the plaintiff commenced this action by way of originating summons against the executors and trustees of the will and codicil of the testator and Frederick Ainger Buckle, an annuitant under the will, for the determination of the question whether or not, upon the true construction of the will and codicils, the

annuities by the will bequeathed to or in trust for the plaintiff and other annuitants, ought to be paid free from any deduction in respect of income tax.

On 5 June, Mr. Justice NORTH, at Chambers, made an order declaring that the plaintiff's annuity was not payable free from income tax.

The plaintiff appealed.

G. P. C. Lawrence, for the appellant, referred to *Gleadow v. Leetham* (1) and *Turner v. Mullineux* (2).

W. B. Coltman, for the respondents.

LINDLEY, L.J. : We are all of opinion that this appeal is well founded. If the testator says that income tax is to be looked upon as a deduction, there is no reason why it should not be treated so. In his will he says the annuitants are to be paid their annuities free "of all deductions except income tax," and in his codicil that they are to be "free of legacy duty and every other deduction." In my opinion he treated income tax as a deduction of which the annuitants were to be free. The case is governed, if at all, by *Turner v. Mullineux* (2) rather than by *Gleadow v. Leetham* (1). The appeal must be allowed.

A. L. SMITH, L.J. : I concur. The testator treated income tax as a deduction.

DAVEY, L.J. : I am of the same opinion.

Appeal allowed.

Solicitors : *Hollams, Sons, Coward & Hawksley; Marson & Son.*

(1) 22 Ch. D. 269; 52 L. J. Ch. 102; 48 L. T. 264; 31 W. R. 269.

(2) 1 J. & H. 334; 3 L. T. 687; 9 W. R. 252.

IN RE BOROUGH COMMERCIAL AND BUILDING SOCIETY.

1893, December 6. LINDLEY, A. L. SMITH, AND DAVEY, L.JJ.

Solicitor—Taxation—Agency Charges—Firms of Solicitors having Common Members—R. S. C. 1883, Appendix N., Costs, r. 119.

Agency charges for work done by a London firm of solicitors as agents for a country firm—two partners out of three in each firm being the same—were disallowed on taxation :—

Held, that, it having been the practice of the Chancery taxing masters for forty or fifty years not to treat cases of two firms having certain partners in common as agency cases at all, the Court could not overrule the practice, and the charges were properly disallowed.

APPEAL from a decision of Vaughan Williams, J.

A summons was taken out by the liquidator of the above-named society against one Wood, an alleged contributory of the society, for payment by him of a call of 5*l.* per share. The summons was refused, with costs, to be paid by the liquidator personally. The order having been completed, Wood's costs were duly carried in by Ramsden, Radcliffe & Co. (a London firm of solicitors) as agents for Ramsden, Sykes & Co., of Huddersfield, for taxation. It appeared that the firms of Ramsden & Radcliffe and Ramsden & Sykes each consisted of three partners, two of whom were partners in both firms, and held certificates for practising in London as well as in the country.

The taxing officer declined to allow certain items—viz. close copies and term fees—on the ground that Ramsden & Radcliffe were not entitled to agency charges (though it was admitted that if they were entitled to agency charges these in question were properly such), but that they were to be treated as being themselves "properly concerned" as principals, inasmuch as the London firm and the country firm had each two common members. The registrar upheld his taxing clerk's decision, and issued his certificate accordingly.

A summons to review the taxation was taken out, but was dismissed by the Judge in Chambers, and subsequently by VAUGHAN WILLIAMS, J., in Court. His Lordship expressed a

strong opinion that these costs ought to be allowed, but did not feel himself at liberty, being comparatively new to Chancery practice, to disregard what was represented to him as being, and having long been, the practice of the Chancery taxing masters—viz. not to treat cases of two firms having a common member as agency cases at all.

From that decision the present appeal was brought.

R. W. Harper, in support of the appeal :

These are proper agency charges, and ought to be allowed. The work was done by Radcliffe, the member of the London firm who is not a member of the country firm, and who is in no sense a Huddersfield solicitor. The practice of refusing to consider cases of this kind as agency cases may exist among the taxing masters, but it is one which has not a sound and proper foundation, and Mr. Justice CHARLES, in a case which came before him in December, 1891, declined to follow it. [The case is unreported, but the papers relative thereto were handed to the Court.]

He also referred to Appendix N. to R. S. C. 1888, Costs, Rule 119.

LINDLEY, L.J. : We have seen Mr. Ryland, the taxing master. He tells us that the practice of the taxing masters is that cases of two firms of solicitors with a common partner are not regarded as agency cases at all. That being so, it is a serious matter to ask us to interfere—to upset a practice which has been established fifty years. The practice is not a whim of the taxing masters, but is one which has sprung up from the common law doctrine which prevents one firm from suing another where there are common partners; the same person cannot be both principal and agent. I do not think it is possible for us to run counter to the practice.

The charges in question are acknowledged as being proper agency charges if the Court should hold that the relation of agency existed, but this class of case has never for forty or fifty years been considered as one of agency at all. A person cannot be principal and agent at the same time. That has been recognized by the law up to recent times—recently, however, it has been made allowable that one

firm should sue another, although consisting partially of the same members.

Rule 119, which has been referred to, was intended to apply to cases which are agency cases, and was not intended to mean that costs of close copies should be allowed in non-agency cases, and does not apply to the present case. If a change in the practice is to be made, the proper way for it to be done is, not through us sitting here judicially, but, by means of the Rule Committee.

The appeal must be dismissed.

A. L. SMITH, L.J.: That the charges in question are properly agency charges, if an agency exists, no one disputes. The question, then, is, Did an agency exist? For half a century it has been the practice that where there are common partners in two firms one firm cannot be considered the other's agents. That answers and settles the question, to my mind.

But then it is said that Rule 119 comes in. But I reply that that Rule only means close copies in cases where agency does exist, and not where agency does not exist.

The decision of Mr. Justice CHARLES, which has been brought to our notice, does seem to run counter to the established practice, and I do not think he was right. If the practice is to be changed at all, it must be by the Rule Committee.

DAVEY, L.J.: It is impossible for us to overrule the practice which has so long existed, even though one may dislike being bound by that which does not commend itself to one's mind. I agree the appeal must be dismissed.

Appeal dismissed (1).

Solicitors : *Ramsden, Radcliffe & Co.*

(1) But see and compare *Stumm v. Dixon*, 22 Q. B. D. 529, at pp. 531, 534; 58 L. J. Q. B. 183; 60 L. T. 560; 37 W. R. 457.

IN RE BRIDGER, BROMPTON HOSPITAL v. LEWIS.

1898, Nov. 3; Dec. 5, 11. LINDLEY, A. L. SMITH AND DAVEY, L.JJ.

Charity—Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), ss. 5, 9—Will made before, Death after, passing of Act—Wills Act (1 Vict. c. 26), s. 24.

The Mortmain and Charitable Uses Act, 1891, applies to wills made before the Act by persons dying after the Act came into operation.

The combined effect of section 9 of the Mortmain and Charitable Uses Act, 1891, and section 24 of the Wills Act is, that where a testator devises or bequeaths to a charity all the property which he can by law so devise or bequeath, the charity will take whatever property answers this description at the testator's death.

APPEAL from the decision of North, J. (1), upon an originating summons.

By his will, dated 29 June, 1891, the testator gave the residue of his real and personal estate to trustees upon trust for sale, conversion, and investment, and to pay the income thereof to the testator's wife for life, and after her decease in trust "to pay such part of my said residuary trust estate which may by law be given for charitable purposes unto the Brompton Hospital for Consumption;" and "as to the rest and remainder of my said residuary trust estate upon trust for Elizabeth Williams" (a niece of the testator's wife) "absolutely." Subsequently to the date of the will—viz. on 5 August, 1891—the Mortmain Act, 1891, was passed (2). The testator died on 20 February, 1892. His residuary trust estate consisted in part of impure personalty (the proceeds of the sale of real estate).

NORTH, J., decided in favour of the hospital. His Lordship considered that, as the testator had died after the date of the passing

(1) 3 R. 65; [1893] 1 Ch. 44; 62 L. J. Ch. 146; 67 L. T. 549; 41 W. R. 104.

(2) Section 5 of the Mortmain and Charitable Uses Act, 1891, enacts that "land may be assured by will to any charitable use." Section 9 enacts that "this Act shall only apply to the will of a testator dying after the passing of the Act."

Section 24 of the Wills Act (1 Vict.

c. 26) enacts that "every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."

of the Mortmain Act, 1891, that Act applied to the will, and that a contrary intention had not been expressed by the words of the will. Elizabeth Williams appealed.

S. Hall, Q.C., and Henry Terrell, for the appellant :

This is merely a question of construction of the words used in the will ; the Mortmain Act, 1891 (2), does not operate retrospectively to alter the construction of the will. A will is to be construed with reference to the state of the law at the time of the will being made : *Jones v. Ogle* (3), *In re March, Mander v. Harris* (4) : and at that date a gift by will of impure personalty to a charity was invalid. Section 24 of the Wills Act (2) does not enact that a will is for all purposes to speak as if made at the date of the testator's death, but only as to the property comprised in it ; that section does not affect the construction of the will nor the devolution of property : *In re Portal and Lamb* (5). Having regard to the state of the law at the date of the making of this will, the expression "such part of my estate which may by law be given for charitable purposes," must be construed as meaning "which may now by law be given for charitable purposes ;" or, in other words, as meaning a gift of pure personalty only, to the charity.

Sir Arthur Watson, Q.C., and J. T. Prior, for the Brompton Hospital :

Having regard to section 24 of the Wills Act, the will speaks, as regards the property comprised in it, as if made at the date of the testator's death, and in the present case at that date, as the Mortmain Act, 1891, was then in force, land or the proceeds of the sale of land could be given for charitable purposes. The Brompton Hospital is therefore entitled to the whole of the testator's residuary estate.

They referred to *Hasluck v. Pedley* (6), *Constable v. Constable* (7),

(3) L. R. 8 Ch. 192 ; 42 L. J. Ch. 334 ; 28 L. T. 245 ; 21 W. R. 236.

(4) 27 Ch. D. 166 ; 54 L. J. Ch. 143 ; 51 L. T. 380 ; 32 W. R. 941.

(5) 30 Ch. D. 50 ; 54 L. J. Ch. 1012 ; 53 L. T. 650 ; 33 W. R. 859.

(6) L. R. 19 Eq. 271 ; 44 L. J. Ch. 143 ; 23 W. R. 155.

(7) 11 Ch. D. 681 ; 48 L. J. Ch. 621 ; 40 L. T. 516.

Langdale v. Briggs (8), *Goodlad v. Burnett* (9), and *Bothamley v. Sherson* (10).

Ingle Joyce, for the trustees of the will.

Hall, Q.C., replied.

Cur. adv. vult.

December 11.

LINDLEY, L.J. (after stating the provisions of the will and the other facts and referring to sections 5 and 9 of the Act of 1891), said: Section 24 of the Wills Act of 1837 requires that every will shall be construed, with reference to the property comprised in it, to speak or take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will. This section has been the subject of many decisions, and from it and them it may be taken as now settled that if a will contains a description of any kind of property, such a description must be held to include and apply to whatever property the testator had at his death which answers the description, unless a contrary intention appears by the will. In *In re Portal and Lamb* (5) the description in the specific devise did not apply to the after-acquired property without stretching the words of the specific devise and defeating the intention of the testator. But, as pointed out in that case, if a testator devises or bequeaths all his property in a particular county or all his Consols to A., and the rest of his estate to B., A. will take whatever property in the county named or whatever Consols the testator has at his death, and will not be confined to the property or Consols which the testator had when he made his will. This section does not by itself quite cover this case, for, although it enables a testator to dispose of property which he does not possess when he makes his will, the section does not of itself enlarge his power of disposing of what he then has. This power, however, is, I think, conferred by section 9 of the Mortmain and Charitable Uses Act, 1891. That section is so worded as to show that the Legislature intended that the Act should apply to wills made before its date, provided they came into operation afterwards.

(8) 8 De G. M. & G. 391; 26 L. J. Ch. 27; 4 W. R. 703.

(9) 1 K. & J. 347.

(10) L. R. 20 Eq. 304; 44 L. J. Ch. 589; 33 L. T. 150; 23 W. R. 848.

Combining this section with section 24 of the Wills Act, the result appears to me to be that, if a testator devises or bequeaths to a charity all the property which he can by law so devise or bequeath, the charity will take whatever property answers this description at the testator's death, and not only that which answered the description when he made his will. Such a devise or bequest would, I apprehend, clearly include property which a testator acquired a right to dispose of under a general power conferred upon him after he made his will. An extension, whether by a statute or otherwise, of a testator's power of disposition in the interval between the making of his will and of his death does not alter the meaning of his language, although such extension will necessarily enlarge the legal effect of that language by making it apply to more objects than it previously would have applied to. This is quite consistent with *Jones v. Ogle* (3) and *In re March* (4).

The foregoing reasoning appears to me to decide this case in favour of the Brompton Hospital. We were asked to read the gift to the hospital as a gift of pure personal estate. But it is not right to substitute one expression for another, and to treat the two as synonymous when their legal effects are, or may be, very different. For the same reason it is not right to insert the word "now," for that might make all the difference, by showing an intention to exclude the operation of section 24 of the Wills Act: see *Cole v. Scott* (11), and other decisions of that class.

We were further asked to say that the testator evidently intended to give his wife's niece something, and that it would be contrary to his intention that she should have nothing. This argument is, in my opinion, by far the strongest in her favour; but, upon reflection, I think it ought not to prevail. I have no doubt that the testator thought that she would get something, but I see no indication of any intention to prefer her to the Brompton Hospital. His intention was precisely the contrary; he intended to give all he could to the hospital, and to give her only what he could not give to it. We must find an intention to deprive the hospital of something which by law he could give to it. Nothing short of that satisfies the words in section 24, or amounts to a contrary intention appearing by the will. For these reasons I think the appeal must be dismissed.

(11) 1 Mac. & G. 518; 19 L. J. Ch. 63.

A. L. SMITH, L.J.: I concur with the judgment of Lord Justice LINDLEY, and also with that which Lord Justice DAVEY is about to deliver, and which I have had the opportunity of reading.

DAVEY, L.J.: The Mortmain and Charitable Uses Act, 1891, was passed on 5 August, 1891. It made a material and substantial alteration in the law relating to charitable gifts, because it enabled impure personalty and land, subject to certain restrictions, to be given to charitable purposes. It altered the definition of "land" in the Charitable Uses Act, 1888; but it was not an Act dealing with the construction of wills, or the meaning of words used in wills; but it was intended to make, and did make, a substantial alteration in the law, which would affect the operation of wills coming within its provisions. By section 9 it is enacted that the Act shall only apply to the will of a testator dying after the passing of the Act. The testator in the case before us made his will on 29 June, 1891, and, therefore, before the passing of the Act; and the will contains the gift, the terms of which I need not read again. The testator died on 20 February, 1892. In my opinion, the Act of 1891 does not affect or alter the meaning of the words used by the testator. What would have been the construction of the gift if the testator had used the word "now," "which may now by law," &c., I do not pause to inquire. But, having regard to section 24 of the Wills Act, I am of opinion that the true meaning and effect of the words used is to pass all property of the testator at the time of his death which could by law be given for charitable purposes. This is in accordance with the decisions on specific gifts. If the words describe a particular property which the testator had at the date of his will, that and that alone will pass. This was the decision of this Court in *In re Portal and Lamb* (5), where this Court differed from Mr. Justice KAY in the Court below, not on the law, but on the construction of the language. But where the specific gift is generic, as "all my lands in the parish of Dale," it will, by the force of the Wills Act, pass all the testator's lands in that parish at the time of his death: *Doe d. York v. Walker* (12). What difference has the Act of 1891 made as regards the gift before us? I adopt the language of Sir G. JESSEL, M.R., in *Hasluck v. Pedley* (6), cited by

LORD JUSTICE FRY in *Constable v. Constable* (7). Speaking of the Apportionment Act, SIR G. JESSEL, M.R., said: "The Act does not affect the meaning of the will; it only alters its legal operation. A devise of Blackacre before the Act carried the accruing rents: now it does not; not because the meaning of Blackacre has been altered, but because the legal effect of the devise is different." So here it appears to me that the bequest of everything which could by law be given to charitable purposes operates upon something which, but for the Act of 1891, it could not have operated upon.

I am, therefore, of opinion that the judgment of Mr. Justice NORTH must be affirmed.

Appeal dismissed.

[Solicitors: *Leathley & Willes; Stanley Evans.*

HOLE v. CHARD UNION.

1893, December 12. LINDLEY, A. L. SMITH, AND DAVEY, L.JJ.

Practice—Assessment of Damages—“Continuing Cause of Action”—Order XXXVI. r. 58.

At the trial of an action to restrain a nuisance an injunction was granted and an inquiry directed as to damages; the chief clerk assessed the damages down to the date of his certificate, the nuisance not having in the meanwhile been abated:—

Held, that the principle of assessment was correct, the repetition of the nuisance since the trial being a “continuing cause of action” within Order XXXVI. r. 58 (1).

THIS was an appeal from a decision of Chitty, J.

The action was brought to restrain a nuisance caused by the pollution of a stream flowing through the plaintiffs’ land by the discharge into it of sewage and refuse by the defendants. At the trial CHITTY, J., on 25 February, 1890, granted a perpetual injunction to restrain the nuisance, but in order to give time to the defendants to alter their sewage system so as to do away with the nuisance, the injunction was suspended for six months until August, 1890. An enquiry was also directed to ascertain what damages the plaintiffs had suffered. The chief clerk assessed the damages under Order XXXVI. r. 58, down to the date of his certificate, 24 July, 1893, the nuisance not having in the meanwhile been abated. CHITTY, J., having upheld the principle of assessment adopted by the chief clerk, the defendants appealed.

Cozens-Hardy, Q.C., Farwell, Q.C. (R. Cunningham Glen with them), for the appellants:

The damages should have been assessed only down to the time when the injunction became operative. Any acts of nuisance after that time would constitute a fresh cause of action for which new damages would be obtainable: *Whitehouse v. Fellowes* (2).

(1) Order XXXVI. r. 58 is as follows: “Where damages are to be assessed in respect of any continuing cause of action, they shall be assessed down to the time of the assessment.”

(2) 10 C. B. N. S. 765; 30 L. J. C. P. 305; 4 L. T. 177; 9 W. R. 557.

Byrne, Q.C., and Percy Bunting, for the respondents :

The cause of action was a continuing one within Order XXXVI. r. 58 (1). [They were stopped by the Court.]

LINDLEY, L.J.: The principal question raised by this appeal is whether the damage sustained by the plaintiffs since the judgment for an injunction came into operation, is to be taken into account in assessing the damages in the action. The nuisance complained of is the pollution of a stream flowing through the plaintiffs' land by the discharge into it of sewage and refuse by the defendants. Mr. Justice CHITTY has granted an injunction restraining the defendants from permitting sewage and refuse from passing into the stream and so causing a nuisance to the plaintiffs, and he further ordered an inquiry what damages the plaintiffs had sustained by reason of the nuisance, but he suspended the injunction for six months.

The question now is what are the damages to which the plaintiffs are entitled. That depends on the construction of Order XXXVI. r. 58. The chief clerk assessed the damages down to the date of his certificate, and we have now to decide whether he was justified in taking into account the damage sustained by the plaintiffs since the injunction became operative. The defendants contend that it was wrong in principle to do so, on the ground that any nuisance committed since then gave rise to a new cause of action, and was not a continuing cause of action within Order XXXVI. r. 58. What is a continuing cause of action? Strictly speaking, there is no such thing. What is called a continuing cause of action is a cause of action which arises from the repetition of acts of the same kind as those for which the action was brought. In my opinion, that is a continuing cause of action within the Rule. The cause of action in the present case seems to me precisely the kind of mischief at which the Rule aimed, its object being to preclude the necessity of bringing repeated actions in respect of repeated nuisances of the same kind. To adopt the defendants' argument would render the Rule a nullity. There is no doubt that this case is a continuing cause of action within the Rule. It is a repetition of acts of the same kind as were investigated at the trial, and then decided to be a nuisance, and the Judge was, therefore,

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right in treating it as a continuing cause of action, and in assessing the damages down to the date of the chief clerk's certificate. The appeal will, therefore, be dismissed.

A. L. SMITH, L.J. : The principal question on this appeal is as to the construction of Order XXXVI. r. 58. The appellants contend that when the act on which an action is brought is established, the cause of action has reference to that one act and no other. In my opinion that is not so. If once a cause of action arises and the acts complained of are repeated, the cause of action continues *de die in diem*. It seems to me that the plaintiffs in this case have not exhausted their cause of action. There was a connexion between the two series of acts before and after the action was brought. They were repeated in succession and became a continuing cause of action. They were an assertion of the same claim—a claim to continue to pour sewage into the stream. Therefore, in my opinion, there was a continuing cause of action within the Rule.

DAVEY, L.J., concurred.

Solicitors : *Vandercom, Hardy, Oatway & Doulton*, for the Appellants.

Walker & Battiscombe, agents for *Partridge & Cockram*,
Tiverton, for the Respondents.

IN RE ELCOM, LAYBORN v. GROVES-WRIGHT.

1893, December 12, 18. LINDLEY, A. L. SMITH AND DAVEY, L.JJ.

Married Woman—Reversionary Interest in Personalty—Will executed before, Codicil executed after, 31 December, 1857—Malins' Act (20 & 21 Vict. c. 57).

A reversionary interest in personalty was bequeathed to A. by a will made in 1836. The testatrix made a codicil in 1864 bequeathing some additional legacies and died in 1866. A. in 1868, whilst under coverture, purported to assign her reversionary interest by deed, which was duly acknowledged:—

Held, that A. was not "entitled under any instrument made after 31 December, 1857," within the meaning of Malins' Act, and therefore was not bound by the deed.

APPEAL from a decision of Chitty, J.

By her will, dated 13 March, 1856, Louisa Elcom, after bequeathing certain pecuniary legacies as therein mentioned, devised and bequeathed all the residue of her real and personal estate to trustees upon trust for conversion and payment of her debts, funeral and testamentary expenses, and legacies, and upon further trust to invest the surplus of her estate, and to pay the annual income arising therefrom to Harriet Wright, the wife of John Wright, for life, and from and after her decease to hold the trust funds and the annual produce thereof in trust for all and every her children and child who, being sons or a son, should attain the age of twenty-one years, or being daughters or a daughter, should attain that age or marry, if more than one child, in equal shares.

The testatrix made a codicil dated 28 April, 1864, whereby she bequeathed certain additional pecuniary legacies: the codicil did not in terms confirm the will. The testatrix died on 19 April, 1866, and her will and codicil were duly proved on 6 June following.

Harriet Wright had nine children, one of whom was the defendant Louisa Wright, who married John Hamilton.

By an indenture dated 2 March, 1868, Mr. and Mrs. Hamilton, did, and each of them did, purport to thereby assign unto one Layborn, his executors, administrators, and assigns, all and singular the share and interest, as well vested as contingent and as well original as accruing, expectant on the decease of Harriet Wright to which she, Louisa Hamilton, or John Hamilton in her right, then

was, or should or might thereafter be, entitled under the will of Louisa Elcom. The indenture was duly acknowledged by Mrs. Hamilton on 7 March, pursuant to the provisions of Malins' Act.

Layborn commenced an action against the present trustees of the will of Louisa Elcom and Mrs. Hamilton, claiming, *inter alia*, a declaration that he was, under and by virtue of the indenture of 2 March, 1868, entitled to the share of residue to which Mrs. Hamilton became entitled under the will of Louisa Elcom.

Mr. Justice CHITTY held that Mrs. Hamilton took the reversionary interest under an instrument made before 31 December, 1857—*i.e.* under the will made in 1856—and accordingly was not bound by the acknowledged deed of 2 March, 1868.

The plaintiff appealed.

Byrne, Q.C., and *Hull*, for the appellant :

The word "instrument" in section 1 of Malins' Act includes a will; but a will means the whole and final expression of the testator's testamentary intentions; and therefore in this case the will and codicil must be taken together as forming one final and complete testamentary instrument, which instrument was made subsequent to 31 December, 1857. The Judge below was influenced by *Rolfe v. Perry* (1), but that was a decision on the effect of Locke King's Act (17 & 18 Vict. c. 117), and does not govern the present case.

They referred to the following authorities: *In re Blackburn, Smiles v. Blackburn* (2), *In re Smith, Bilke v. Roper* (3), *In re Butler's Trusts* (4), *Lemage v. Goodban* (5), *Skinner v. Ogle* (6), *Winter v. Winter* (7), *Anderson v. Anderson* (8), and *Roberts v. Cooper* (9), also to the Wills Act (1 Vict. c. 26), ss. 24, 34, and Jarman on Wills, 5th ed. p. 157.

(1) 3 De G. J. & S. 481; 32 L. J. Ch. 471; 8 L. T. 441; 11 W. R. 674.

(2) 43 Ch. D. 75; 59 L. J. Ch. 208; 38 W. R. 140.

(3) 45 Ch. D. 632; 60 L. J. Ch. 57; 63 L. T. 448; 39 W. R. 93.

(4) 3 Ir. R. Eq. 138.

(5) L. R. 1 P. 57; 35 L. J. P. 28; 13 L. T. 508.

(6) 1 Robertson, 363.

(7) 5 Hare, 306.

(8) L. R. 13 Eq. 381; 41 L. J. Ch. 247; 20 W. R. 313.

(9) [1891] 2 Ch. 335; 60 L. J. Ch. 377; 64 L. T. 584.

Vaughan Hawkins, for the respondents, was not called upon to argue.

LINDLEY, L.J.: I think that the language of Malins' Act is too strong for the appellant, although we have certainly no disposition to assist the respondent, Mrs. Hamilton, and only do so if we are obliged. The facts are shortly these: In 1856, Louisa Elcom made a will giving her residuary estate to the mother of Mrs. Hamilton for life, with remainder to her children who should attain twenty-one or marry. In 1864 the testatrix made a codicil giving certain additional legacies. In 1866 the testatrix died. In 1868 Mrs. Hamilton purported to assign her share of the residuary estate of the testatrix to one Layborn. Malins' Act was passed in August, 1857, section 1 of which provides that "after 31 December, 1857, it shall be lawful for every married woman by deed to dispose of every future or reversionary interest, whether vested or contingent, of such married woman or her husband in her right in any personal estate whatsoever to which she shall be entitled under any instrument made after the said 31 December, 1857 (except such a settlement as after mentioned)," and so on. The short point which we have to decide is whether Mrs. Hamilton became entitled to this reversionary interest "under an instrument made after 31 December, 1857." If she did, then the assignment by her by the indenture of March, 1868, is good, and she is bound by it; if she did not, that assignment is inoperative.

It is argued for the appellant that the will and codicil together constitute the "instrument" under which she is entitled, for that a "will" means the aggregate of a person's testamentary dispositions. No doubt for some purposes a "will" does mean that. But the question is, What does the Act mean when it speaks of being "entitled under any instrument made after the said 31 December?" When was this will made so as to confer a title for the purposes of the Act? My answer is, that it was when it was first executed. As to authority, cases do not throw much light upon the matter, but, if we are to have any, the one that seems to me to be nearest in point is *Rolfe v. Perry* (1). I think the appeal therefore fails.

A. L. SMITH, L.J.: I think so too. The question is, Under what instrument did Mrs. Hamilton become entitled to this

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interest? I think, without doubt, under the will which was made on 13 March, 1856. It was said that, because the testatrix made a codicil to that will in 1864, Mrs. Hamilton became entitled under the aggregate of the testamentary dispositions. But I ask, Did she become entitled under the codicil? If anything, she rather became disentitled under the codicil. I agree that the appeal fails.

DAVEY, L.J.: I am of the same opinion. I do not think that "instrument" in Malins' Act is to be construed as being equivalent to "will" in the sense of an aggregate of testamentary dispositions. The will made in 1856 is one of certain testamentary dispositions, and, so far as it is not revoked, remains in force, and I do not hesitate to say Mrs. Hamilton is entitled under it.

Appeal dismissed.

Solicitors: *W. J. Fraser; George Brown, Son & Vardy.*

MARTIN v. PRICE.

1893, December 7-9, 19. LINDLEY, A. L. SMITH AND DAVEY, L.JJ.

Injunction or Damages—Jurisdiction—Discretion—Lord Cairns' Act (21 & 22 Vict. c. 27), s. 2—Ancient Lights—Obstruction.

Where the plaintiff's ancient lights have been obstructed to a substantial extent by a new building, and will be still further obstructed by the carrying out of the building scheme, the plaintiff *prima facie* is entitled to an injunction to restrain such further obstruction, the Court having no discretion to award damages in lieu thereof. The Court awarded damages in respect of the obstruction caused by the part of the building already erected.

Dreyfus v. Peruvian Guano Co. (1) and *Holland v. Worley* (2) discussed.

APPEAL by the plaintiff from a decision of Kekewich, J.

The plaintiff was the lessee of certain premises in Temple Street, Birmingham, under a lease which would expire in 1922; and the defendant was lessee of premises situated on the opposite side of the street, and belonging to the same freeholder.

(1) 43 Ch. D. 316; 62 L. T. 518.

(2) 26 Ch. D. 578; 54 L. J. Ch. 268; 50 L. T. 526; 32 W. R. 749.

The premises of which the plaintiff was lessee consisted of three adjoining buildings, which were not occupied by the plaintiff, but were sublet by him to various yearly tenants. The height of the buildings was about 40 feet. The defendant's premises, which were held on a similar lease to those of the plaintiff, consisted also of three buildings, the average height of which was 37 feet above the street level.

In August, 1893, the plaintiff discovered that the defendant was pulling down his premises for the purpose of rebuilding, but the plaintiff paid no particular attention to the fact until 6 October, when he received a letter from one of his tenants, in consequence of which, on 7 October, he inspected the whole of the premises, and found that the defendant had already carried up one of his new buildings some 25 feet higher than the height of the old building. At the date of the issue of the writ in the action (10 October) part of the front wall of the defendant's new building, having a frontage of 27 feet, had been erected to a height of $24\frac{1}{2}$ feet higher than the old building, but no other part of the new building had been carried up higher than the height of the old building, viz. 37 feet above the street level.

On 10 October, 1893, the plaintiff issued his writ in this action, claiming an injunction to restrain the defendant from building higher than the height of the old building, and to compel the defendant to pull down so much of the new building as was higher already : the writ also claimed damages.

On 27 October, 1893, a motion for an injunction, which was by consent treated as the trial of the action, was heard before KEKEWICH, J., and evidence was taken orally thereat.

The learned Judge found, as facts upon the evidence, that certain windows in the plaintiff's premises were ancient lights, that the plaintiff's ancient lights had been already obstructed to a substantial extent by that part of the defendant's new building which had already been carried $24\frac{1}{2}$ feet higher than the defendant's old building, and would be still further obstructed if the defendant were to carry his new building to the height indicated in his plans, viz. a height varying from 62 to 66 feet above the street level. None of the plaintiff's yearly tenants had given notice to terminate their tenancies in consequence of the diminution of light ; and the

plaintiff, on the hearing of the motion before KEKEWICH, J., adduced no evidence to show that the letting or selling value of his property would be thereby interfered with, while the defendant adduced evidence to the contrary effect.

Upon consideration of all the above-mentioned facts, KEKEWICH, J., held that the case fell within that class of cases in which the Court might and should, in the exercise of its discretion, award damages instead of an injunction; and he accordingly refused to grant an injunction, and awarded the plaintiff the sum of 120*l.* "for liquidated damages and compensation for actual and possible interference with the ancient lights of the plaintiff according to the present building plans of the defendant," and further directed the defendant to pay the costs of the action.

The plaintiff appealed.

Warmington, Q.C., Renshaw, Q.C., and Micklem, for the appellant:

The appellant is entitled to an injunction. The Judge below found that there has been and will be a substantial interference with the appellant's right of access of light, and the appropriate remedy for the protection of that right, at least so far as regards threatened infringement, is by injunction: *Aynsley v. Glover* (3), *Greenwood v. Hornsey* (4); unless the appellant has by *laches* disentitled himself to an injunction: *National Provincial Plate Glass Insurance Co. v. Prudential Assurance Co.* (5). Apart from Lord Cairns' Act (21 & 22 Vict. c. 27), s. 2, this is a proper case for an injunction, at least so far as the buildings not yet erected: *Nates v. Jack* (6).

[DAVEY, L.J.: Damages under Lord Cairns' Act are not confined to damages at common law, because at common law, when you would only get nominal damages, under Lord Cairns' Act damages might be given in the sense of compensation.]

[LINDLEY, L.J.: At common law before Lord Cairns' Act it was

(3) L. R. 18 Eq. 544; 43 L. J. Ch. 777; 31 L. T. 219; 23 W. R. 147, affirmed L. R. 10 Ch. 283; 44 L. J. Ch. 523; 32 L. T. 345; 23 W. R. 457.

(4) 33 Ch. D. 471; 55 L. J. Ch. 917; 55 L. T. 135; 35 W. R. 163.

(5) 6 Ch. D. 757; 46 L. J. Ch. 871; 37 L. T. 91; 26 W. R. 26.

(6) L. R. 1 Ch. 295; 14 L. T. 151; 14 W. R. 618.

necessary to bring a succession of actions each time any addition was made to the building complained of. In equity an injunction was accordingly allowed to stop prospective injury; and then Lord Cairns' Act was intended to empower the Courts of equity to grant damages either together with or in lieu of an injunction.]

Lord Cairns' Act was discussed in *Dreyfus v. Peruvian Guano Co.* (1); *Krehl v. Burrell* (7) shows that where a plaintiff has established his right to an injunction the Court has no power under Lord Cairns' Act to oblige him to accept damages in lieu of the injunction. It is true that a Court of equity will not grant a mandatory injunction except under special circumstances, but will grant damages instead: *Stanley of Alderley v. Shrewsbury* (8), *Hackett v. Baiss* (9), *City of London Brewery Co. v. Tennant* (10); but that does not prove that the Court has jurisdiction to award damages instead of a non-mandatory injunction where the right to a non-mandatory injunction exists. The only case which goes that length is *Holland v. Worley* (2); that was a decision of Mr. Justice PEARSON, and can be reviewed in the Court of Appeal; it was distinguished in *Greenwood v. Hornsey* (4) and *Dicker v. Popham* (11), and has not commanded the approbation of the profession (*per* Mr. Justice KEKEWICH in *National Telephone Co. v. Baker*) (12). The appellant is entitled to an injunction to protect his rights as they stood at the date of the issue of the writ.

They also referred to *Sayers v. Collyer* (13) as to the effect of Lord Cairns' Act, and to *Goodson v. Richardson* (14) and *Scott v. Pape* (15) as to the right to an injunction.

Jelf, Q.C., and Ingpen, contra:

If there be any jurisdiction to grant damages instead of an injunction, then it was a matter of judicial discretion, as the Judge

- (7) 11 Ch. D. 146; 48 L. J. Ch. 252; 40 L. T. 637; 27 W. R. 805.
- (8) L. R. 19 Eq. 616; 44 L. J. Ch. 389; 32 L. T. 248; 23 W. R. 678.
- (9) L. R. 20 Eq. 494; 45 L. J. Ch. 13.
- (10) L. R. 9 Ch. 212; 43 L. J. Ch. 457; 29 L. T. 755; 22 W. R. 172.
- (11) 63 L. T. 379.
- (12) 3 R. 318; [1893] 2 Ch. 186; 62 L. J. Ch. 699; 68 L. T. 283.
- (13) 28 Ch. D. 103; 54 L. J. Ch. 1; 51 L. T. 723; 33 W. R. 91.
- (14) L. R. 9 Ch. 221; 43 L. J. Ch. 790; 30 L. T. 142; 22 W. R. 317.
- (15) 31 Ch. D. 534; 55 L. J. Ch. 426; 54 L. T. 399; 34 W. R. 463.

below had at least some evidence on which he might have found that damages were the proper remedy instead of an injunction, and he has so found. This Court ought not to interfere with the exercise of judicial discretion by the Judge below: *Golding v. Wharton Salt Works Co.* (16). There is no authority for the distinction drawn by the appellant between mandatory and non-mandatory injunctions.

[LINDLEY, L.J.: The appellant says that the cases show that Lord Cairns' Act ought not to be construed so as to be made the medium of doing an injustice.]

There is nothing in that statute or in the cases to confine the discretion of the Court to cases of mandatory injunctions. *Holland v. Worley* (2), on the contrary, shows that it is not so limited, and that case has never been overruled. It will be a serious injury to the defendant to have his new building stopped at its present height; the new building cannot be used as it stands at present, and if an injunction is granted the defendant will in effect be driven to pull down what he has already built; that is a matter which ought to be considered: *Smith v. Smith* (17), *National Provincial Plate Glass Insurance Co. v. Prudential Assurance Co.* (5). There was no evidence adduced by the plaintiff to show that the selling or letting value of his leasehold interest was depreciated; the plaintiff is not in occupation of the premises himself, and his tenants made no complaint of their own accord; there was evidence adduced by the defendant to show that there was no material diminution of light, or of comfortable occupation of the plaintiff's premises.

[DAVEY, L.J.: If that be so, then Mr. Justice KEKEWICH was wrong in giving the plaintiff damages, and you ought to be the appellant.]

At all events, the comfortable occupation of the plaintiff's premises was not so interfered with as to diminish the value of the plaintiff's premises.

Renshaw, Q.C., in reply:

Whether a mandatory injunction ought to be granted or not does not necessarily depend on the circumstances as they existed at the

(16) 1 Q. B. D. 374; 34 L. T. 474; 24 W. R. 423.

(17) L. R. 20 Eq. 500, 505; 44 L. J. Ch. 630; 32 L. T. 787; 23 W. R. 771.

time of the issue of the writ: *Laurence v. Horton* (18). The plaintiff in the present case was guilty of no delay, and there is nothing to prevent him getting a mandatory injunction as to what was done after the issue of the writ.

Cur. adv. vult.

December 19.

The judgment of the Court was delivered by

LINDLEY, L.J.: [The Lord Justice stated the facts and the decision of Mr. Justice KEKEWICH, and proceeded:] The plaintiff has appealed from that decision upon the ground that he is entitled to an injunction, and that the learned Judge had no jurisdiction to award damages in lieu of an injunction in respect of that part of the defendant's house which was not yet higher than the old building which the defendant had pulled down. The plaintiff also complains that the learned Judge had no sufficient materials for estimating the amount of damages, no evidence having been adduced by the plaintiff on that point, he wanting an injunction and not damages. The defendant has given no cross-notice of appeal, but he has contended that the learned Judge had jurisdiction to do what he did; that whether an injunction should be granted or damages be awarded was a matter for the discretion of the Judge, and that even if an appeal from the exercise of such discretion will lie, there are no grounds which will justify the Court of Appeal in interfering with its exercise in this particular case. The defendant, moreover, contended that the interference with the plaintiff's lights was, and would be, so small that the damages awarded were extremely liberal, if not extravagant.

The question whether the Court has jurisdiction to award damages by way of compensation for an injury not yet committed but only threatened and intended is by no means free from difficulty. On the one hand, the Court of Appeal, in *Dreyfus v. Peruvian Guano Co.* (1), expressed a clear opinion against the existence of such jurisdiction (see *per* Lord Justice BOWEN and *per* Lord Justice FRY); on the other hand, it has been very commonly assumed (and there are several observations by eminent Judges favouring the view) that there is such a jurisdiction; and in

Holland v. Worley (2) the late Mr. Justice PEARSON did award damages in lieu of an injunction, which, if granted, would have been simply preventive and in no sense mandatory. The question is one of very great importance, but we do not think it right to keep the parties waiting whilst we make up our minds upon it. If there is no such jurisdiction the order appealed from will be wrong. Assuming the jurisdiction to exist, we are of opinion that upon the facts of this case the plaintiff was entitled to an injunction to restrain the defendant from continuing to build higher than the old house to the detriment of the plaintiff. The learned Judge found as facts that some of the plaintiff's lights were ancient, and that they were already obstructed to a substantial extent, and would be still further obstructed. He found that the plaintiff had sustained and would sustain material injury entitling him to substantial damages. We see no reason to differ from him on these matters of fact. The plaintiff's legal right and its infringement and threatened further infringement to a material extent being thus established, the plaintiff is entitled to an injunction according to the ordinary principles on which the Court is in the habit of acting in these cases. There might, of course, be circumstances depriving the plaintiff of this *primâ facie* right, but we can discover none in this case. The order appealed from, therefore, must be discharged, so far as it awards damages only to the plaintiff, and in lieu thereof the order will be for an injunction in the ordinary form to restrain the defendant from continuing to build higher than the height the old building stood above the level of the street, to the injury of the plaintiff, and for an inquiry as to the damages sustained by the plaintiff by reason of the buildings already erected beyond that height, such inquiry to be conducted before an official referee, and the defendant to pay such damages, the costs of such inquiry to be reserved to be dealt with by the Judge.

Appeal allowed.

Solicitors: *Sharpe, Parker & Co.*, for *Ryland, Martineau & Co.*,
Birmingham, for the Appellant.

Burton, Yeates & Hart, for *Edge & Ellison*, Birmingham,
for the Respondent.

IN RE FISHER (DECEASED).

1894, January 18. LINDLEY, KAY AND A. L. SMITH, L.JJ.

Costs—Payment of Money out of Court—No Provision in Special Act as to Costs—Discretion—R. S. C., 1883, Order LXV. r. 1—Supreme Court of Judicature Act, 1890 (53 & 54 Vict. c. 44), s. 5.

Section 5 of the Judicature Act, 1890, confers a jurisdiction which did not previously exist, and gives the Court a discretion as to the costs of payment out of Court of money in a case where the special Act, under which the money is paid in, is silent as to them.

In re Mills' Estate (1) superseded.

APPEAL from a decision of Chitty, J.

The trustees of the will of Robert Fisher, deceased, in whom a subsisting trust for sale was vested, applied for payment out of Court of certain moneys which had been paid in by the Commissioners of Sewers under the Act 57 Geo. III. ch. xxix.

The petition was intituled under the Act 57 Geo. III. ch. xxix., the City of London Sewers Act, 1848, and the Settled Land Acts, 1882 to 1890. The Act 57 Geo. III. ch. xxix. provided for the costs of reinvestment in land, but contained no provision as to costs on payment out. The question was whether the commissioners should bear the costs of the payment of the money out.

CHITTY, J., held that section 5 of the Judicature Act, 1890, (2) conferred a new jurisdiction, and that he had a discretion, which he exercised, to order the commissioners to pay the costs.

The commissioners appealed.

John Henderson, for the appellants :

There is no jurisdiction to order the appellants to pay the costs. The Act of 1890 ought to be construed in the same way as

(1) 34 Ch. D. 24; 56 L. J. Ch. 60; 55 L. T. 465; 35 W. R. 65.

(2) Section 5 of the Judicature Act, 1890, provides as follows: "Subject to the Supreme Court of Judicature Acts and the Rules of Court made thereunder, and to the express provisions of any statute, whether passed before or after the commencement of this Act, the costs of and incident to all proceed-

ings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or Judge, and the Court or Judge shall have full power to determine by whom and to what extent such costs are to be paid."

Order LXV. r. 1 was in *In re Mills' Estate* (1) : it was passed to get rid of *Garnett v. Bradley* (3) and that class of cases. The Act is, with immaterial exceptions, in the same terms as the rule. *London County Council v. West Ham* (4) is no authority for this case, as it turned upon section 4.

He also referred to *Tenant v. Ellis* (5) and *Rockett v. Clippingdale* (6).

A. T. Murray, for the respondents, was not called upon to argue.

LINDLEY, L.J. : I have not the slightest doubt about this. The Act 57 Geo. III. ch. xxix., under which this money has been paid into Court, does not, as many other Acts do not, contain any provision as to who is to bear the costs of payment out. Different Courts had formerly taken different views of their powers to order payment in cases of this kind. The Court of Chancery took a different view from the Court of Exchequer, and held there was no power. In that unsatisfactory state of things *Ex parte Mercers Co.* (7) came up for decision. It was reconsidered in *In re Mills' Estate* (1), and it was then felt that the difficulty ought to be got rid of by legislation. The Judicature Act of 1890 was passed, the effect of section 5 of which was to give the Court a discretion. I have no doubt about it. The appeal must be dismissed.

KAY, L.J. : I am of the same opinion. *In re Mills' Estate* (1) said that Order LXV. r. 1 must be construed narrowly, and did not increase the jurisdiction of the Court. Lord Justice Cotton in that case asks this question : " Was the object of the Rules and Orders made under the Judicature Act to give the Court a jurisdiction which did not previously exist, or was it not rather to regulate the manner in which the jurisdiction given to the Court, and which the Court had independently of Order LXV. r. 1, was to be exercised ? " That was in 1886, and with the decision of that

(3) 3 App. Cas. 944; 48 L. J. Ex. 186; 39 L. T. 261; 26 W. R. 698.

(4) [1892] 2 Q. B. 173; 61 L. J. M. C. 210; 67 L. T. 363; 40 W. R. 662.

(5) 6 Q. B. D. 46; 60 L. J. Q. B. 143; 43 L. T. 506; 29 W. R. 121.

(6) [1891] 2 Q. B. 293; 60 L. J. Q. B. 782; 64 L. T. 641.

(7) 10 Ch. D. 481; 48 L. J. Ch. 384; 27 W. R. 424.

case before them the Legislature passed the Act of 1890, section 5 of which, though to some extent in the very same terms as the Rule, goes beyond it. The Act contains words which the Rule does not, the object of which must be to give the Court a power which it did not possess before. It is impossible, to my mind, to read section 5 in any way but as an enabling enactment giving the Court a power it had not before, there being a limitation to the power given—namely, that it is to be “subject to the Judicature Acts and Rules, and to the express provisions of any statute;” that limitation means that if there is any provision in the Judicature Acts or Rules made under them which is applicable to the question at issue, or if there is any express limitation contained in any statute, the power is to be subject to that. I have no doubt that section 5 of the Act of 1890 was passed in consequence of the decision in *In re Mills’ Estate* (1) as an enabling enactment, and provided for a want which formerly existed when the Court was unable to do justice between the parties in cases such as the present. I think Mr. Justice CHITTY was right, and that the appeal should be dismissed.

A. L. SMITH, L.J. : I think the decision of Mr. Justice CHITTY was quite right. We are asked to put a restricted construction on section 5 of the Judicature Act of 1890, because a restricted construction was put upon Order LXV. r. 1 in *In re Mills’ Estate* (1). I do not agree to that contention. I think the section confers a new jurisdiction subject as therein mentioned.

Appeal dismissed.

Solicitors : *E. A. Baylis ; Paddison, Fullilove, Cummins & De la Chapelle.*

THORNE v. HEARD.

1894, January 12, 24. LINDLEY, KAY AND A. L. SMITH, L.JJ.

Trustee—Breach of Trust—Fraud of Agent—Liability of Principal—Statute of Limitations—“Party or privy to” Fraud—Trust Property “still retained” by Trustee—Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 8.

The fraud of an agent, to make the principal liable, must be committed within the scope of his authority and for the benefit of the principal.

A person who knows nothing of the fraudulent act of another, and in no way ratifies or benefits by it, and has no moral complicity with it, cannot be said to be “party or privy to” it within the meaning of section 8 of the Trustee Act, 1888.

To exclude a trustee from the benefit of that section on the ground that the trust property is “still retained” by him, it must be in his hands or within his control at the date of the writ.

Blair v. Bromley (1) and *Moore v. Knight* (2) distinguished.

APPEAL from a decision of Romer, J. (3).

The defendants, Heard and Marsh, were the transferees of an indenture of mortgage dated 5 August, 1868, to secure 1,000*l.* charged on a leasehold property called “The Nest,” held under a lease for ninety-nine years from 24 June, 1867. The mortgage contained the usual power of sale and the usual declaration as to the application of the purchase-money. The plaintiff Thorne was the transferee of two subsequent mortgages on the same property to secure 333*l.* One Searle, a solicitor, acted in these mortgage transactions for both the plaintiff and the defendants, and also for the mortgagor. He was himself a third mortgagee of the property, and there was due to him as such third mortgagee a sum of 375*l.* 3*s.* 6*d.*

In the year 1878 the defendants, in exercise of the power of sale contained in the mortgage of 5 August, 1868, sold the leasehold premises to a Mrs. Stewart for 1,700*l.*, and the premises were conveyed to her. The sale was conducted by Searle for the defendants; he paid 1,000*l.* of the purchase-money over to the defendants in satisfaction of their own mortgage and retained the remainder in

(1) 2 Ph. 354; 16 L. J. Ch. 495.

(2) [1891] 1 Ch. 547; 60 L. J. Ch. 271; 63 L. T. 831; 39 W. R. 312.

(3) 3 R. 631; [1893] 3 Ch. 530; 62 L. J. Ch. 1010; 68 L. T. 791; 41 W. R. 636.

his hands, ostensibly to be dealt with as to 333*l.* for the plaintiff's benefit, he having fraudulently represented himself as the plaintiff's agent. Searle handed two receipts to the defendants, but their attention did not appear to have been called to their contents, which were in the following terms, and dated 5 February, 1878:—

“Received of Heard and Marsh the sum of 333*l.*, being principal money due to Thorne on two further charges by way of mortgage on ‘The Nest,’ Torquay, Devon, dated respectively 25 June, 1869, and 22 November, 1870, and I undertake to deliver to them the indentures dated 15 and 18 March, 1872, being transfers of such mortgages, and Thorne’s receipt indorsed thereon, within fourteen days from this date.—JAMES SEARLE.”

“Received of Heard and Marsh the sum of 375*l.* 3*s.* 6*d.*, being the balance of the purchase-money of ‘The Nest,’ Torquay, Devon, sold to Mrs. Stewart for 1,700*l.* (after their retaining the sum of 1,000*l.* due on their first mortgage, and paying to Thorne the sum of 333*l.* due to him on mortgage of the same premises, subject to the first security to them), the sale thereof having been carried out by Heard and Marsh with the approval of Thorne and at my request.—JAMES SEARLE.”

The sale was not, as it was stated in the last-mentioned receipt to be, with the approval, nor was it with the knowledge of the plaintiff, and Searle did not pay over the 333*l.* to him, but made use of it for his own purposes, though he continued to pay interest to the plaintiff as if on his mortgages down to shortly before the time when he became bankrupt in February, 1892, when it transpired that he had used the moneys so received for his own purposes.

This action was brought on 30 August, 1892, by the plaintiff, claiming, as against the defendants, the sum of 333*l.*, or for an account of the surplus moneys realized by the sale after satisfying the moneys due to the defendants. Mr. Justice ROMER held that the defendants were not liable to the plaintiff for the balance of the sale moneys, since, even if they had been guilty of negligence in not seeing that Searle had authority from the plaintiff to receive the money for him and in not seeing that Searle paid it to him, section 8 of the Trustee Act, 1888, barred the claim, and the subsequent

payment of interest by Searle did not keep the right of action alive against the defendants.

The plaintiff appealed.

Cozens-Hardy, Q.C., J. W. Clydesdale, and W. A. Peck, for the appellant :

The respondents are liable. The fraud was committed by Searle acting within the scope of his authority as their agent, and binds them. They, by culpable negligence, enabled him to commit the fraud, and so were "party or privy" to it within the meaning of section 8 of the Trustee Act, 1888, which does not mean that they must be criminally or morally inculpated in the fraudulent act. They cannot, therefore, have the benefit of the section so as to plead the Statute of Limitations. Further, the money was "still retained" by them in law within the meaning of the section, Searle having been their agent to receive it, and on that ground also they are outside the benefit of the section.

Chadwyck Healey, Q.C., and Creed, for the respondents :

The money was not "retained" by the respondents when it was misappropriated by Searle; money is only "still retained" within the meaning of the section when it is in the pocket of, or can be got at, by the trustee. "Still" means at the time of the writ being issued. The object of the section is to prevent a trustee who can get at the money pleading lapse of time and so keeping it. Again, if the respondents are to be fixed with constructive notice of the contents of the receipts so as to be made liable under them, they ought also to have the benefit of them. Again, the fraud of an agent, to make the principal liable for it, must be committed in a matter which is within the scope of his authority and for the benefit of his principal: *British Mutual Banking Co. v. Charnwood Forest Railway* (4). There is no moral fraud suggested against the respondents; they were in no sense "party or privy" to Searle's fraud within the meaning of the section. You cannot charge a person with concealed fraud when the original fraud could not be brought home to him if it had not been concealed. The six years

under the Statute of Limitations began to run in favour of the respondents in 1878, when the fraud was committed.

Cozens-Hardy, Q.C., in reply :

The right of action did not accrue to the plaintiff till the fraud was discovered in 1892. Searle was employed by the respondents, upon the authority of the receipts, to pay the money to the plaintiff, and they are therefore liable for his fraud. Both the appellant and the respondents are innocent parties ; one must suffer ; and as the respondents have been negligent and the plaintiff has not, they ought to suffer.

The following cases were also referred to in the course of the arguments : *Gibbs v. Guild* (5), *Blair v. Bromley* (1), and *Moore v. Knight* (2).

Cur. adv. vult.

January 24.

LINDLEY, L.J. : The liability of the defendants is clear, unless they are protected by section 8 of the Trustee Act, 1888, which makes the Statute of Limitations applicable to trustees in certain cases. The section was evidently intended to give considerable protection to honest trustees who have incurred personal liability by committing some breach of trust. Upon this enactment and the facts of this case two questions arise—viz. (i.) When did the plaintiff's right of action accrue ? (ii.) If it accrued more than six years before the commencement of the action, does the case come within one of the exceptions to which the Statute of Limitations is made inapplicable ?

First, as to the time when the cause of action accrued to the plaintiff. The defendants, as first mortgagees, sold in January, 1878. Searle, as their solicitor, received the purchase-money, and paid them, and undertook to pay the plaintiff out of the balance. There was no fraud, and consequently no concealed fraud, in this transaction. The plaintiff's right to be paid by the defendants accrued as soon as they received the purchase-money from the purchaser, and the receipt of that money by Searle was clearly a receipt by the defendants, he being their agent to receive it for them. The fraud which was concealed occurred after this trans-

(5) 9 Q. B. D. 59 ; 51 L. J. Q. B. 313 ; 46 L. T. 248 ; 30 W. R. 591.

(LINDLEY, L.J.)

action, and after the right sought to be enforced in this action accrued to the plaintiff. The fraud was the misappropriation by Searle of the plaintiff's money to his own use, and the concealment of that fraud was effected by the continued payment of interest to the plaintiff by Searle, purporting to act on behalf of the mortgagor, whose solicitor he also was. The fraud thus perpetrated and concealed by Searle cannot, in my opinion, be treated as perpetrated or concealed by the defendants. They, in fact, knew nothing of it; and in perpetrating and in concealing the fraud Searle was not acting, or even purporting to act, for the defendants. He was acting fraudulently in his own interest, pretending to the defendants that he had authority from Thorne to receive the amount due to him, and undertaking to remit it to him, and pretending to Thorne that his security was still subsisting, and paying interest to him accordingly. Consistently with *British Mutual Banking Co. v. Charnwood Forest Railway* (4), these frauds of Searle cannot be regarded as the frauds of the defendants—*i.e.* as frauds committed by their agent for them, or for their benefit, and for which they are legally responsible, although completely innocent of all fraud themselves. The case of *Blair v. Bromley* (1), which was relied upon as showing that in equity the cause of action ought to be regarded as accruing when the fraud was discovered, and not before, is clearly distinguishable on this ground. The fraudulent transaction in that cause was itself the cause of action, and the innocent partner was liable for that fraud, and it was concealed by the fraudulent partner, both when the fraud was committed and afterwards whilst he was a member of the firm as well as after he had retired from it. *Moore v. Knight* (2) was a similar case. In both cases the fraud and its concealment in the first instance were, though committed by one partner, imputable to the firm, and under those circumstances the cause of action was held not to accrue until the fraud was discovered.

The law applicable to the Statute of Limitations in cases of concealed fraud was carefully examined by this Court in *Willis v. Howe* (6), which was an action for the recovery of land, and the

(6) 2 R. 427; [1893] 2 Ch. 545; 62 L. J. Ch. 690; 69 L. T. 358; 41 W. R. 433.

right of the plaintiff turned on 3 & 4 Will. IV. c. 27, s. 26. The point whether section 26 applies only to frauds committed by the defendant or those through whom he claims, or whether it extends to frauds committed by strangers, will be found alluded to by Lord Justice KAY, and he, following Vice-Chancellor KINDERSLEY in *Petre v. Petre* (7), expressed his opinion that the fraud to avail the plaintiff must have been committed by the defendant or some person through whom he claimed. This accords with Lord REDSDALE's opinion in *Hovenden v. Lord Annesley* (8). He puts the doctrine of concealed fraud thus. He says that the defendant's conscience is so affected that he ought not to be allowed to avail himself of the statute or lapse of time. *Willis v. Howe* (6), moreover, decided that a fraud committed and concealed, even by the defendant or one of his predecessors in title, would not avail the plaintiff if the fraud and its concealment were subsequent to the wrongful entry which gave the plaintiff or his predecessors a right to bring ejectment. This last point had in fact been already decided by the House of Lords in *Lawrance v. Norreys* (9). No question of agency arose in *Willis v. Howe* (6), but that case has a very important bearing on the present, for the statutory enactment on which the case turned is a legislative recognition and expression of previously well-settled principles in equity, and those principles were and are applicable to all kinds of property, and not to real property only.

Although, however, the equitable doctrine respecting concealed fraud is based on the moral injustice of allowing a man to take advantage of his own fraud and concealment, I am of opinion that, if the defendants were liable for Searle's fraud and concealment, the cause of action against the defendants would not have accrued to the plaintiff until its discovery by him, or at all events until he might have discovered it with reasonable diligence. Section 8 of the Trustee Act, 1888, has in no way altered the principles which determine the time when a cause of action accrues: see *Moore v. Knight* (2). In the case of a breach of trust a cause of action founded upon it accrues to the *cestui que trust* upon the com-

(7) 1 Drew. 397; 1 W. R. 139.

(8) 2 Sch. & Lef. 634; 9 R. R. 119.

(9) 15 App. Cas. 210; 59 L. J. Ch. 681; 62 L. T. 706; 38 W. R. 753.

(LINDLEY, L.J.)

mission of the breach of trust (*In re Swain* (10)), unless that breach of trust is a fraudulent breach of trust, and is concealed by the trustee committing it, or by some person for whom he is legally responsible. In this case the plaintiff's cause of action against the defendants was a breach of trust committed by them, but not a fraudulent breach of trust; the fraud and its concealment were subsequent to the breach of trust, and were both attributable to Searle, who committed the fraud and concealed it, not for the defendants, nor even ostensibly for them, but really for himself, and pretending to act, first, for the plaintiff, and afterwards for the mortgagor. I come, therefore, to the conclusion that the plaintiff's cause of action against the defendants accrued in January, 1878—i.e. more than six years before the commencement of the action, and that the Statute of Limitations protects the defendants, unless the case falls within one or other of the exceptions mentioned in section 8 of the Trustee Act, 1888.

I pass, therefore, to the second of the questions before stated. Section 8 contains three exceptions—viz. (i.) frauds to which the trustee has been party or privy; (ii.) cases in which trust property is still retained by the trustee; (iii.) cases in which a trustee has converted trust property to his own use. The third exception need not be further alluded to in the present case. Counsel for the appellant contended that the facts of this case brought it within the first exception, but I am clearly of opinion that they do not. It is only by a misuse of language that a person who in fact knows absolutely nothing of the fraudulent conduct of another, who in no way benefits by it or ratifies it, can be said to be party or privy to it. One person may be, and often is, liable in law for frauds which he has not committed, but to say that he is party or privy to them is quite another matter, and is only true when he has personally in some way participated in them. The defendants were, in my judgment, in no sense whatever either fraudulent themselves or parties or privies to the fraud of Searle. It was next urged that the case fell within the second exception, and that the defendants still retained the plaintiff's money. This, however, again, is, in my opinion, not true in fact. The word "still" refers to the com-

(10) [1891] 3 Ch. 233; 61 L. J. Ch. 20; 65 L. T. 296.

mencement of the action, and the use of the word is important. A trustee may be liable to make good trust money, with interest, as if it were still in his hands, and yet he may not in fact have it. But, in construing this statute, we have to ascertain whether in fact the trust property sought to be recovered is still retained by the trustee. That question ought to be answered in the affirmative if he, or any agent for him, has it so that he can get it; but in the negative if it has been lost, whether by his negligence or otherwise. The second exception applies to, and is confined to, cases in which at the date of the writ the trustee still retains—*i.e.* has in his hands or under his control—the trust property, or the proceeds thereof, sought to be recovered. It assumes that the property sought to be recovered exists, and can be recovered. But, at the date of the writ in this action, the defendants had not in fact got the money sought to be recovered, nor had they it under their control. They had, in fact, lent it and lost it. But for the statute they would be liable for it with interest; but the statute protects them, for in no proper sense of the expression can they be said still to retain the money. The appeal must, therefore, be dismissed.

KAY, L.J.: In 1878 the first mortgagees of certain real property sold it for 1,700*l.* 1,000*l.* of this went to pay off their mortgage, and there remained a surplus of 700*l.* The plaintiff was second mortgagee of the same property for 333*l.* He now sues the first mortgagees for this balance. Undoubtedly the first mortgagees became trustees of the surplus proceeds: *Mathison v. Clark* (11), *Charles v. Jones* (12), *Magnus v. Queensland National Bank* (13). They have not paid the plaintiff any part of it, and *prima facie* they are liable. But they claim the benefit of the Statute of Limitations contained in section 8 of the Trustee Act, 1888. And if they have not been party or privy to any fraud or fraudulent breach of trust, or have not retained the trust fund, or have not converted it to their own use, they may succeed in this defence, provided that six years have elapsed since the cause of action accrued.

The circumstances are very peculiar. At the time of the sale the

(11) 25 L. J. Ch. 29; 4 W. R. 30.

(12) 35 Ch. D. 544; 56 L. J. Ch. 745; 56 L. T. 848; 35 W. R. 645.

(13) 37 Ch. D. 466; 57 L. J. Ch. 413; 58 L. T. 248; 36 W. R. 577.

(KAY, L.J.)

defendants were the first mortgagees, the plaintiff was the second, and Searle, a solicitor, was the third. Previously to the sale Searle had been accustomed to pay interest on the mortgages as solicitor for the mortgagor. Searle acted in the sale as solicitor for the vendors, the first mortgagees. By their authority he received the whole of the purchase-money. He paid to them 1,000*l.* in discharge of the first mortgage. He retained the 700*l.* surplus proceeds. He gave to the first mortgagees two receipts, one for 333*l.* on account of principal money due to the plaintiff on his mortgage, and by the same document he undertook to deliver the mortgage deeds of the plaintiff to the first mortgagees within fourteen days from 5 February, 1878, the date of the receipt. The other receipt was for the balance of the purchase-money, and was delivered the same day, and with it Searle gave a separate undertaking to hand over his own mortgage deeds to the first mortgagees. If these receipts and undertakings had been brought to the knowledge of the defendants it might be argued that the nature of Searle's possession of the surplus proceeds was changed as between him and the first mortgagees. But their attention was not called to them, and, although Searle handed them with other papers to the first mortgagees, they were entirely ignorant of the contents of them. In fact, they left the surplus proceeds of the sale of the property in Searle's hands without any direction as to their application, and without any inquiry as to what he did with the money. Searle kept the money in his own possession, applied it to his own use, and became bankrupt in 1892. The plaintiff, the second mortgagee, first discovered these facts after Searle's bankruptcy, and on 30 August, 1892, he brought this action against the first mortgagees. On 3 January, 1878, Searle had written to the plaintiff informing him that the mortgaged property was under contract for sale, and saying that the solicitors to whom the abstract was sent required to see the plaintiff's mortgage. The plaintiff thereupon sent the mortgage to Searle, who returned it in January, 1879. Except for this intimation, the plaintiff knew nothing of the sale, and was never informed that a sale had been carried out.

Of course, the defendants are liable, unless the statute to which I have referred protects them. It has been argued that they were

party or privy to Searle's fraud. Even if it could be said that they were liable for his fraud, it is another thing to say that they were party or privy to it. I think that those words in the statute indicate moral complicity, which is not suggested in this case. Then the defendants certainly did not convert the money to their own use. Therefore, neither of those exceptions can apply. Did they retain the money? That is more doubtful. Searle's receipt of the money as their agent and by their direction was equivalent to a receipt by the defendants. It absolved the purchaser, and neither against him nor against the persons entitled to the surplus could they be treated as not having received it. Then, while the money remained in Searle's hands without any change in the nature of his possession of it, I should think that his retention of it was a retention by the first mortgagees. *Mr. Chadwyck Healey* argued, and I am inclined to accept his argument, that the intention of the exception in the statute was to prevent a trustee using the bar by lapse of time to enable himself to appropriate a trust fund, which he had not appropriated but had the power of appropriating. Money in the hands of an agent, from whom it could be recovered by the trustees, would be in this position, and it could not be the intention of the statute that the trustee might bar the *cestui que trust* and then recover the money from his own agent and keep it. For example, if the trustee had paid the money to his own separate account at a bank, not mixing it with his own money, so long as he could recover it from the banker I should think he retained it within the meaning of this exception in the Act. Up to the moment of Searle's bankruptcy the first mortgagees might have recovered the money from him, and until then I think the exception applied as to the whole. I am inclined to think that any dividend which they can obtain in the bankruptcy would be in the same position. But it is not necessary to decide this, because we are informed that the estate will pay no dividend. I am, therefore, compelled to conclude that, after Searle's bankruptcy and at the date of the writ in this action, the defendants did not "still" retain these moneys.

Thus far I have been treating the case as though the six years began to run from the time when Searle received the money. It would, if the plaintiff had been aware of such receipt. It was the duty both of Searle and the defendants to inform the plaintiff of this, and it was certainly a fraudulent act on Searle's part to omit

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to do so and to apply the money to his own purposes. The time would only begin to run against Searle from the discovery of his fraud in 1892. This was always the rule in equity, and since the Judicature Act it is the rule in all branches of the High Court (Judicature Act, 1873, ss. 23, 24, sub-s. 1: *Gibbs v. Guild* (5)). It is argued that the defendants are liable for the fraud of their agent which their breach of trust by leaving the money in his hands enabled him to commit, and that, therefore, time did not begin to run in their favour until the plaintiff discovered this fraud. For this proposition the authority of *Blair v. Bromley* (1) was cited. In that case a retired partner in a firm of solicitors was held liable for the fraudulent representation of his co-partner, William Bromley, that a fund intrusted to the firm for investment on mortgage had been so invested. In fact it was not, but the money was used by the firm, though without the knowledge of the partner who was sued. Lord COTTENHAM held that the liability which arose from the representation was "merely a guarantee that the parties whose interest might be affected by the misrepresentation shall be placed in the same situation as if the fact represented were true," and that the fraudulent partner might bind his co-partner "by an act which, though not constituting a contract by itself, is in equity considered as having all the consequences of one." Lord COTTENHAM goes on thus: "I am therefore of opinion that William Bromley's partner, though he had no knowledge, or means of knowledge, of his misrepresentation, would have been affected by this equity arising from it, and that time did not begin to run against the plaintiff's right until the discovery of the fraud"—that is, that, although the retired partner was not an accomplice in the fraud, and, indeed, had no knowledge, or means of knowledge, of it, and therefore, of course, did not conceal the fraud in any sense, he could not avail himself of any lapse of time before the discovery of the fraud by the person injured by it. In *Moore v. Knight* (2) it was held by Mr. Justice STIRLING that this decision was not affected by the statute we are now considering. It seems to follow that when a principal is liable for the fraud of his agent time does not begin to run so as to bar the remedy against him until the injured person has discovered the fraud. And to invoke this doctrine it is not necessary to prove concealment of the fraud by the principal.

Now, in *Blair v. Bromley* (1) the retiring partner had the benefit of the fraud. Is the principal liable for the fraud of an agent from which he obtains no benefit, but which was committed solely to benefit the agent? In *St. Aubyn v. Smart* (14) receipt of money by one of several partners with the knowledge of the others was held sufficient to make them all liable, although the firm did not benefit, the partner who received the money having paid it to his private account, from which he drew it out and absconded. Lord Justice Wood said: "It is a fraud of one partner for which the other is liable." But in the earlier part of his judgment the Lord Justice treats the money as having been received by the firm and by them paid to the private account of the partner who misappropriated it. In *Barwick v. English Joint-Stock Bank* (15) Mr. Justice WILLES stated the general rule to be, "that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved." This passage was cited with approval by Lord SELBORNE in *Houldsworth v. City of Glasgow Bank* (16), and it was deliberately decided in *British Mutual Banking Co. v. Charnwood Forest Railway* (4), that the words "for the master's benefit" in that statement of the doctrine are essential, and that where an agent in the course of his employment committed a fraud, not for his principal's benefit, but for the benefit of himself, and the principal did not benefit by the fraud, he could not be made liable for it.

On the whole, I come reluctantly to the conclusion that the cause of action did accrue when Searle first received the money, and that section 8 of the Trustee Act, 1888, bars the remedy against the defendants. The case seems a very hard one; the plaintiff has been deprived of his property by a breach of trust of which he knew nothing and without any fault or negligence of his own. But the proximate cause of his loss is the fraud and bankruptcy of Searle, to whom the statute would give no protection. By that fraud the defendants have not benefited, and I think they cannot be made liable for it.

(14) L. R. 3 Ch. 646; 19 L. T. 192; 16 W. R. 1095.

(15) L. R. 2 Ex. 259, 265; 36 L. J. Ex. 147; 16 L. T. 461; 15 W. R. 877.

(16) 5 App. Cas. 317, 326; 42 L. T. 194; 28 W. R. 677.

A. L. SMITH, L.J.: This action is brought by the plaintiff to have an account taken of certain moneys which in the year 1878 came into the defendants' possession as trustees for the plaintiff, the real question being whether the defendants can avail themselves of the provisions of section 8 of the Trustee Act of 1888 (51 & 52 Vict. c. 59), and set up against the plaintiff's claim that his cause of action did not accrue within six years before action brought.

In 1878 the defendants, who were trustees and first mortgagees of certain premises at Torquay to secure 1,000*l.*, sold them under their power of sale and realized thereby the sum of 1,700*l.* The plaintiff was second mortgagee of the premises to secure the amount of 333*l.*, and a solicitor named Searle, who was then a well-known local practitioner and trusted by all parties, had a third charge on the property. Upon the sale being effected the proceeds of the 1,700*l.* were, with the defendants' assent, received by Searle, who handed 1,000*l.* over to the defendants to satisfy their mortgage debt, and gave the two receipts which have been referred to. The defendants at the time did not read these documents, they placed them with their trust papers believing that everything would be in order and honestly and efficiently carried out by Searle. It now appears that Searle, instead of handing over to the plaintiff the sum of 333*l.* due to him, as he undertook to do, misappropriated it to his own use and kept the fact of the sale concealed from the plaintiff, and to effect this paid and continued to pay the plaintiff interest upon the 333*l.* down to the year 1892, upon the footing that his second mortgage was still extant. In February of that year he became bankrupt, and his defalcations were discovered and the present action was then commenced.

It is not disputed that but for section 8 of the Trustee Act of 1888, upon which the defendants rely in the circumstances of this case, they would be liable to account to the plaintiff. There are three exceptions to the privilege conferred by this section. First, if there has been a fraud or fraudulent breach of trust to which the trustee was party or privy; secondly, if the trust property or its proceeds is still retained by the trustee; thirdly, if the trust property has been converted to the trustee's own use; in either of such cases the trustee is not to have the benefit of the section. These exceptions are framed to meet the cases of trustees who have been

either guilty of fraud or who are holding, by themselves or their agent, or have converted to their own use the trust property—in other words, who are themselves fraudulent, or are appropriating or have appropriated the trust property to themselves.

As to the first exception, it is clear to me that the defendants have not been party or privy to the fraud of Searle. A man cannot be said to be party or privy to that in which he has taken no part and of which he knows nothing, and which has, in fact, been committed by another for his own benefit. As to the second exception, the question is, Was the 333*l.* “still retained”—mark the word “still”—that is, as I read it, at the time of action brought—by the defendants? In my judgment a man cannot be said to retain that which in fact he has not got, and which he has no power of getting.

It is true that the defendants fourteen years before action brought had in their possession the 333*l.*, for the receipt by their agent Searle was a receipt by them. It is also true, as argued by *Mr. Cozens-Hardy*, that they never consciously parted with the possession of these moneys which they then had, for they thought nothing more about them, but this is not decisive on this point. Suppose these moneys had before action brought been stolen from the defendants and the thief had remained unknown and the money unrecovered, can it be said that the trustees “still retained” them? It seems to me impossible to so hold, and that upon the facts of this case the defendants did not retain these moneys within the meaning of this section when the action was brought. There is no pretence for saying that at this time Searle was holding the moneys for the defendants; they had been made away with by him without the defendants’ knowledge, and we are told that any dividend coming from his estate is not worth considering. In my judgment the second exception does not apply to them. It is conceded that they are not within the third exception.

But it is argued for the plaintiff that his cause of action only accrued to him upon discovery of Searle’s fraud immediately before the issue of the writ in 1892, and that the defendants consequently cannot prove their defence that the plaintiff’s cause of action arose six years before suit. It appears to me that *primâ facie* the plaintiff’s cause of action against the defendants arose in the year 1878, when the defendants by their solicitor, Searle, received the 333*l.*, and which the defendants then neglected to hand over to the plaintiff.

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It is, however, answered that although this might be so but for Searle's fraud, yet his fraud, intentionally concealed from the plaintiff, kept him in ignorance of his rights, that Searle's fraud was the defendants' fraud, and that time, therefore, did not begin to run against the plaintiff until the time when he might first with reasonable diligence have discovered the fraud. I agree that if an action had been brought by the plaintiff against Searle for an account he could not have set up the Statute of Limitations. It would in such action have been a good replication to the plea of the Statute of Limitations that the plaintiff did not discover and had not reasonable means of discovering the defendant's fraud until within six years before action brought. The case of *Gibbs v. Guild* (5) has held this to be so.

It will be noticed that Searle's fraud was wholly disconnected with the defendants, and only came into existence after the defendants had failed to hand over the moneys as they should have done in 1878 to the plaintiff, and therefore after the cause of action against them had accrued. It has been held by this Court, and not, I think, for the first time, in *British Mutual Banking Co. v. Charnwood Forest Railway* (4), where the authorities are collected, that a principal cannot be sued for the fraudulent acts of his agent, even though the agent purported to act within the scope of his employment, if, when he committed the fraud, he did so, not in the interest of his principal, but in his own interest. If the plaintiff was attempting to sue the defendants for damages occasioned to him by reason of the fraudulent acts of Searle, he could not, in my judgment, succeed, because a principal is not responsible for his agent's fraud, which is perpetrated only in the agent's interest. Then, why are the defendants not to be allowed to rely upon what the statute permits them to set up and rely on, if they have not been guilty of some fraud themselves or of some fraud for which they are responsible? I can see no answer to this, and it appears to me that the defendants are entitled to rely upon the statute, and that Searle's fraud does not incapacitate them from so doing.

But it was said that the case of *Blair v. Bromley* (1) decided the contrary, and that the plaintiff's cause of action did not arise until the fraud was discovered. In that case one partner in a firm of solicitors was sued for a fraudulent misrepresentation made by his

partner in relation to a matter within the limits of the partnership business, and which continued by concealment after the dissolution of the firm. Lord COTTENHAM held that the fraudulent misrepresentation was the representation of the firm, and that the cause of action against the innocent partner did not therefore arise till the firm's fraud was discovered. In the present case, as before pointed out, Searle's fraud was not the defendants' fraud, and hence the distinction between the two cases. Mr. Justice STIRLING, in the case of *Moore v. Knight* (2), held that the decision in *Blair v. Bromley* (1) was unaffected by section 8 of the Trustee Act of 1888, and pointed out how that case rested upon principles of law relating to representation and partnership.

It was not contended in this Court that the payment of the interest by Searle to the plaintiff took the case out of the statute.

In my opinion the judgment of Mr. Justice ROMER must be upheld, and the appeal dismissed.

Appeal dismissed.

Solicitors: *Mear & Fowler*, for *G. H. Thorne*, Nottingham;
Yarde & Loader, for *Prickman & Risdon*, Exeter.

IN RE LANDS ALLOTMENT CO.

1894, January 31; February 1, 2. LINDLEY, KAY, AND
 A. L. SMITH, L.JJ.

Company—Directors—Breach of Trust—Statute of Limitations—Trustee Act, 1888 (51 & 52 Vict. c. 59), ss. 1, 8—Companies (Winding-up) Act, 1890 (53 & 54 Vict. c. 63), s. 10—Confirmation of Minutes of previous Meeting as Evidence of Concurrence in ultra vires Resolutions of such Meeting.

As directors are trustees of the assets of their company which come to their hands or which are under their control, the Statute of Limitations may, by virtue of section 8 of the Trustee Act, 1888, be pleaded by them where it is sought to make them liable for breach of trust for the improper application of such assets.

Directors whose sole connexion with an improper application of assets is their being present at the directors' meeting which confirms the minutes of the meeting at which the improper application was resolved upon, cannot be thereby held to concur in the improper application.

APPEAL from a decision of Wright, J., sitting as an additional Judge of the Chancery Division.

Two summonses were taken out under section 10 of the Companies (Winding up) Act, 1890, by the official receiver and liquidator in the winding-up of the Lands Allotment Company with the object of making certain of the directors liable for alleged breaches of trust.

The first summons was against Pattison, Burns, Dibley and Theobald, who had been directors of the company, and it was sought to make them jointly and severally liable to make good to the assets of the company the sum of 35,000*l.*, alleged to have been improperly employed by them out of the moneys of the company in the purchase of 7,000 shares of 5*l.* each in the Building Securities Company (Limited).

By the second summons the official receiver and liquidator sought to have Barnard, Dresser, Brock, and Theobald declared jointly and severally liable for 5,200*l.* invested in the purchase of 1,040 other shares in the Building Securities Company (Limited).

The facts relating to the first summons were as follows: Early in 1885 one Hobbs was indebted to the Lands Allotment Company to the extent of 35,000*l.*, and the Building Securities Company was formed to take over his business of a builder, including his then existing liabilities, and after the formation of this company, as between the company and Hobbs, it became the duty of the company to pay off this debt of 35,000*l.* But the company, not having the money in its hands for this purpose, made an arrangement with the Lands Allotment Company by which, in substance, the Lands Allotment Company was to take shares in the Building Securities Company to the extent of 35,000*l.* in satisfaction of Hobbs' debt. These shares were fully paid up, and were accepted by the directors of the Lands Allotment Company in good faith. This transaction was referred to in the balance-sheet of the Lands Allotment Company issued in March, 1885, as follows: "Assets by Building Securities Company, 35,000*l.*" At the annual general meeting of the Lands Allotment Company, held in April, 1885, at which the respondents to the first summons were present, Jabez Balfour, who was then one of the directors of the company, was questioned by a shareholder as to this item, and according to the shorthand notes of the proceedings he replied that it was an asset representing an amount which had to be paid by the Building Securities Company in respect of an estate they had purchased

from the Lands Allotment Company, and he explained that the item was put down as a separate item in order that the shareholders might see what it was. From the reports of subsequent general meetings it appeared clear that in November, 1888, and probably in 1887, the shareholders knew that this item of 85,000*l.* represented shares in the Building Securities Company. Under these circumstances the respondents claimed the benefit of the provisions of the Trustee Act, 1888, extending the Statute of Limitations to trustees. On the other hand, it was contended that the directors were not trustees within the meaning of the Act, and, further, that the case was taken out of the Statute of Limitations by reason of Balfour's false representation at the general meeting and the acquiescence of the respondents in that false representation.

The facts with regard to the second summons were as follows: At a board meeting in July, 1889, it was resolved to apply for 1,040 more shares in the Building Securities Company, and the purchase-money (5,200*l.*) was paid for by three bills, which were duly met by the Lands Allotment Company. At a board meeting in October, 1889, the minutes of the July meeting were read over and confirmed. Of the respondents to this summons Barnard and Dresser were alone present at the July meeting. Brock, who had been chairman of the company for some time, signed the minutes at the meeting of October, and in April, 1890, at the annual general meeting, he made a speech, in which, referring to the purchase of the additional shares, he said: "We carefully considered the matter, and, having regard to the excellent return on our then holding and our confidence in the management of the company, we deemed it advisable that we should exercise our right of subscription, and we have since had no reason to regret the decision, seeing that the company is paying an eminently satisfactory dividend of 7 per cent." Theobald was on the high seas at the date of the July meeting, and, though he was present at the meeting in October when the minutes of the previous meeting were confirmed, he did not vote for their confirmation. It was not seriously disputed that this transaction was *ultra vires*.

In December, 1893, the summonses were heard before Mr. Justice WRIGHT, who, with regard to the first transaction, held that that

also was *ultra vires*, but that the respondents were entitled to plead the Statute of Limitations, and he dismissed the summons relating to that. With regard to the second summons, he held that Barnard and Dresser were liable, but that Theobald and Brock were not, as they had not taken any active part in the transaction complained of. The Official Receiver appealed.

Finlay, Q.C., E. S. Ford, and Muir Mackenzie, appeared for the appellants :

The company had no power under its memorandum of association to invest in shares of other companies, and the transaction is therefore *ultra vires*. This being so, the directors are liable. They are not trustees, and therefore cannot, under section 8 of the Trustee Act, 1888, claim the benefit of the Statute of Limitations. Even if they are trustees, the evidence shows a case of concealed fraud, which prevents their setting up the statute: *Sovereign Life Assurance Co. v. Wilmot* (1), *In re Faure Electric Accumulator Co.* (No. 2) (2), *In re Sharpe, Masonic and General Life Assurance Co. v. Sharpe* (3), *In re Exchange Banking Co., Flitcroft's case* (4), *Moore v. Knight* (5), *Blair v. Bromley* (6), *In re National Permanent Mutual Benefit Building Society* (7).

As to the second summons, Brock and Theobald must on the evidence be held to have concurred in the misapplication of the 5,200*l.*, and are therefore liable jointly and severally with the other two: *Ashurst v. Mason* (8), *In re Oxford Benefit Building and Investment Society* (9).

Marshall Hall and *R. E. Moore* appeared for the respondent Brock.

Ingpen, for the respondent Burns ;

- (1) 9 Times L. R. 525.
- (2) 40 Ch. D. 141; 58 L. J. Ch. 48; 59 L. T. 918; 37 W. R. 116.
- (3) [1892] 1 Ch. 154; 61 L. J. Ch. 193; 65 L. T. 806; 40 W. R. 241.
- (4) 21 Ch. D. 519; 52 L. J. Ch. 217; 48 L. T. 86; 31 W. R. 174.
- (5) [1891] 1 Ch. 547; 60 L. J. Ch. 271; 63 L. T. 831; 39 W. R. 312.
- (6) 2 Ph. 354; 16 L. J. Ch. 495.
- (7) 43 Ch. D. 431; 59 L. J. Ch. 403; 62 L. T. 596; 38 W. R. 475.
- (8) L. R. 20 Eq. 225; 44 L. J. Ch. 337; 23 W. R. 506.
- (9) 35 Ch. D. 502; 56 L. J. Ch. 98; 55 L. T. 598; 35 W. R. 116.

Swinfen Eady, Q.C., Woodfall, and G. E. Tyrrell, for the respondent Dibley;

H. Reed, Q.C., and C. E. E. Jenkins, for the respondent Theobald; and

Houghton, for the respondent Pattison, were not called upon to argue.

LINDLEY, L.J.: This is an application under section 10 of the Companies (Winding-up) Act, 1890. Two summonses have been taken out under that section against former directors of the Lands Allotment Company which is now being wound up. The object of the first summons is to compel certain gentlemen to refund or make good the sum of 35,000*l.*, to which I will allude presently. The object of the second summons is to compel two of them, namely, Brock and Theobald, to make good a sum of 5,200*l.*

Now, as to the 35,000*l.*, the case stands in this way: Hobbs was indebted to this company to the extent of 35,000*l.*; a company called the Building Securities Company was formed to take over Hobbs' business, to take over his assets and his liabilities, and under the arrangements made in the formation or after the formation of the Building Securities Company, it became the duty of this company, as between it and Hobbs, to pay off that 35,000*l.* which he owed to the Lands Allotment Company, and it proceeded to do that in this way. The Building Securities Company had not, as I infer from the form taken by the transaction, the 35,000*l.* with which to pay off Hobbs' debt, and so it said to the Lands Allotment Company, "If you will buy 35,000*l.* of our shares, and send us a cheque for it, you shall have the cheque back, and so we will repay you Hobbs' debt," and that farce was gone through. Now what is the effect of that? In point of fact, no money passed out of the coffers of the Lands Allotment Company into the coffers of the Building Securities Company. It was a mere paper transaction so far as cash was concerned. It is very true cheques were handed into the bank one day and taken out the next—it went through bankers, but the net result and the real substance of that transaction when you get at it—when you see through the cloak which is thrown around it—is that the Lands Allotment Company took 35,000*l.* worth of shares in the Building Securities Company in

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satisfaction of Hobbs' debt. That is the real truth. [His Lordship considered the facts above set forth, and while doubting whether the investment was *ultra vires* the directors of the Lands Allotment Company, said he would assume for the purposes of his judgment that it was so. He then continued :] Then, if it was an improper transaction, all those directors who were parties to this improper investment—for in this point of view it was improper—would obviously be liable to make good these moneys. All that is conceded if the assumption is granted.

Then comes the question whether they are protected by the Statute of Limitations which is applicable to trustees, and the learned Judge has held that they are, and I confess it appears to me that he is clearly right in the construction which he puts upon the Trustee Act, 1888. Consider what we are asked to do here. We are asked to say that the directors are liable for these moneys upon the footing that they committed a breach of trust, but that they are not entitled to the benefit of the Statute of Limitations which comes into operation through a statute which was passed for the benefit of trustees. I cannot be party to any decision so manifestly absurd. It appears to me, when the Trustee Act, 1888, has to be applied to directors, you must bear in mind that, though directors are not trustees—if you talk of them generally it would be a mistake altogether to say that they are—yet they have always been considered and treated as trustees of money which comes to their hands or which is actually under their control, and they have, ever since companies were invented, been held liable to make good moneys which they have misapplied, upon the footing that they were trustees, and it has always been held that they are not entitled to the benefit of the old Statute of Limitations because they have committed breaches of trust, and are, as regards such money and in respect of such money, to be treated as trustees. Then when the Legislature passed an Act of Parliament protecting trustees against actions for breaches of trust, how can it with any sense be said that they are not to have the benefit of this statute? I cannot go that length. I am satisfied that the statute does apply.

Now let us look at the words of subsection 3 of the first section of the Trustee Act, 1888. It says this: "For the purposes of this

Act the expression 'trustee' shall be deemed to include an executor or administrator, and a trustee whose trust arises by construction or implication of law as well as an express trustee, but not the official trustee of charitable funds." I rather think that, when you look at that decision in which Lord Justice Bowen took so much pains in classifying trustees and in distinguishing constructive trustees from express trustees (10), you will find that directors are express trustees of money of which they have control. But if not, certainly they come within the other part of the definition of "by construction or implication of law." It is precisely because they are one or the other that they always have been held liable and have always been denied the benefit of the Statute of Limitations. That being the case, I have no hesitation in saying that these gentlemen are within the statute, the Trustee Act, 1888—that is, always subject to some observations I must make about alleged concealed fraud. I have no doubt the statute applies to them and applies to all directors who have got in their hands or under their control moneys of a company, and who by mistake or carelessness misapply it. Of course, we know that there are words in section 8 of the Trustee Act, 1888, which render the Statute of Limitations inapplicable to the cases there mentioned, which are substantially cases of misappropriation of money to the use of the persons misapplying it and cases of fraud.

But although, so far, I have no doubt whatever that this Trustee Act, 1888, is applicable, this point is raised which is important. It is said: "This is one of those cases of concealed fraud in which the Statute of Limitations does not apply—that is to say, that the cause of action did not accrue until the fraud was discovered." [His Lordship having dealt with the evidence, held that the plea of concealed fraud could not be supported, and that the appeal against the learned Judge's decision as regards these directors in respect of the 35,000*l.* must be dismissed with costs as against all of them.]

I now come to the second transaction, which is a different matter altogether. It appears that in July, 1889, a further sum of 5,200*l.* was invested. This sum was really invested in the purchase of shares in the Building Securities Company. There were 1,040

(10) *Soar v. Ashwell*, 4 R. 602; [1893] 2 Q. B. 390; 69 L. T. 585; 42 W. R. 165.

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shares at 5*l.* each which were applied for and taken ; they were not paid for in cash at the time, but by three bills maturing at various dates. Now, at the meeting of 1 July, 1889, neither Brock nor Theobald, who are sought to be made liable for this improper investment, was present. On 9 October, after two of the bills which had been given had become due and had been paid, and whilst the third bill was running and before it became due, the minutes of the meeting of 1 July, 1889, were confirmed with others—there were several of them—and at that confirmation meeting on 9 October, 1889, Theobald and Brock were both present, and it is because Theobald was present at that meeting that it is sought to charge him with liability in respect of this sum. It is quite certain upon the evidence that he had nothing to do with the transaction originally. The case against him is simply that he was party to that confirmation, and it is put in this way, that he thereby adopted or ratified it, and that he, at all events, might have taken legal proceedings or induced the company to take legal proceedings to set aside the transaction. I am not aware of any authority which goes the length of saying that a director who is not a party to any misapplication of a company's funds is liable for not taking legal proceedings to upset the transaction after the thing is done, and I do not think it would be in accordance with the principles applicable to these cases if we were now to make a precedent of that kind. I am satisfied from Theobald's affidavit that he knew nothing at all about the matter, and when he did come back and found out what was done, in any business point of view it was too late. The matter was over so far as he was concerned. It appears to me, therefore, that Mr. Justice WRIGHT's view was correct in exonerating Theobald from all liability in respect of that sum.

As regards Brock, the case is a very different one indeed. [His Lordship on the evidence held that Brock, although absent in July, 1889, had taken such an active part in the negotiation of the improper investment that he must be held liable for the 5,200*l.*]

KAY, L.J. : The transaction as to the 35,000*l.* seems to have been of this kind. [His Lordship stated the facts, and said he would for the purposes of argument assume the investment in the shares to

have been *ultra vires*.] Then comes the question, what was the position of the directors who made an improper and *ultra vires* investment of that kind? Now, case after case has decided that directors of trading companies are not for all purposes trustees or in the position of trustees or *quasi* trustees, or to be treated as trustees in any sense. But if they deal with the funds of a company, although those funds are not absolutely vested in them—funds which are under their control—and deal with those funds in a manner which is beyond their powers, then as to that dealing they are treated as having committed a breach of trust. Sir GEORGE JESSEL, in *In re Forest of Dean Coal Mining Co.* (11), said this: “They are, no doubt, trustees of assets which have come into their hands, or which are under their control, but they are not trustees of a debt due to the company.” So that when they get assets of the company under their control or into their hands and deal with them in a way which is beyond the powers of the company they are liable as for a breach of trust. Well, then, that is not denied. But it is said that they are not absolutely trustees—they are *quasi* trustees, and, being in that position, they do not come within and were designedly omitted from the definition of trustees in the Act of 1888—which is now superseded by the Act of 1893—which was the Act applying to this case, one section of which limits the liability of trustees. With deference I entirely dissent from that argument. It seems to me that the words used in the definition clause of that Act—the first clause—do expressly include precisely such a case as a director dealing with moneys of the company in such a way as to make him liable as trustee. Because the words are these: “For the purpose of this Act the expression ‘trustees’ shall be deemed to include an executor or administrator, and a trustee whose trust arises by construction or implication of law as well as an express trustee.” Now, how does this obligation of a director and trustee arise if it does not arise construction or implication of law? It seems to me that the words are apt to include that very case, and were intended to include a case of that kind. It is said by way of argument, “Why does not the definition clause include directors?” But it would have been quite wrong to have included directors,

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because directors are not always trustees. As directors they are not trustees at all. They are only trustees *quâ* the particular property which is given into their hands or is under their control, and which they have applied in a manner beyond the powers of the company. I conceive that *quâ* such fund, they are constructive trustees or trustees by implication of law, and they come exactly within the words of this definition in the Act, and therefore section 8 of the Act, which applies to all persons who come within this definition of trustees, does apply to exonerate these directors from that misapplication of funds to which otherwise I assume they would have been liable. [His Lordship having considered the evidence on the question of concealed fraud, held that it was quite insufficient to render these directors liable.]

Now I will only say a very few words with reference to the other point as to the liability of Brock together with the two gentlemen who have been declared liable—Barnard and Dresser—for the second investment in the shares of the Building Securities Company. That investment was not made till 1889, and therefore six years had not run when this proceeding was taken against them. The Statute of Limitations, therefore, has nothing to do with that case, and there the only question is, who were the persons who really did concur in making that investment?—a thing beyond the powers of the company—and any director who did concur in that misapplication of the funds of the company to the extent of 5,200*l.* would be jointly and severally liable. Barnard and Dresser were the persons who were present at the meeting of 1 July, 1889, when it was resolved to make this purchase of further shares in the Building Securities Company, and they have been declared liable, and I understand there is no appeal on their part. [His Lordship decided, after considering the evidence, that Brock did concur in the propriety of the investment before it was made, and agreed to it, and that he was liable together with Dresser and Barnard.] As to Theobald, there is nothing to make him party to this further investment, except the fact that he was present at the meeting of 9 October, 1889, at which, amongst other things, the minutes of the meeting of 1 July, 1889, were read and confirmed. I agree with Lord Justice LINDLEY as to that, and I do not think there was enough in that

circumstance alone to make him liable, looking to the evidence that he himself has given, and, therefore, I think Theobald cannot be made liable as to this further investment.

A. L. SMITH, L.J. : My brethren who have preceded me have fully covered this case with regard to the different points which had to be adjudicated upon, and I entirely agree with them, and have nothing to add thereto.

I wish to say one word about this Trustee Act of 1888, which has been so much discussed. The argument put forward on the appellant's behalf is this : " There may be an express trustee ; there may be a trustee whose trust arises by implication of law "—I leave out construction of law—"and there may be a *tertium quid*," and the *tertium quid* which Mr. Finlay suggested was a gentleman in a fiduciary position. Now, I do not agree with him at all about that *tertium quid*. It seems to me that the *tertium quid* is this—a man who is not an express trustee, and whose trust does not arise by implication of law—and if that be the true reading of this section, it is perfectly obvious that these gentlemen do not have the Statute of Limitations to rely upon against the present claim. But if they come within what I call the *tertium quid*, that is, not being an express trustee, or not a trustee whose trust arises by implication of law, they have the ordinary Statute of Limitations to rely upon—six years. If, however, they are express trustees, or trustees whose trust arises by implication of law, then they have the Statute of Limitations which is afforded by this Act of 1888, except they are deprived thereof by reason of the three exceptions which are set out in section 8 of that Act. Therefore it seems to me, whatever way you take this case, the Statute of Limitations is available for these gentlemen.

I now come to the question of fraudulent concealment. That does not arise, it seems to me, under this Act of 1888 at all. It has nothing to do with it. It arises upon both statutes, and it arises upon the fact that, although under both statutes the defendant may after six years plead the Statute of Limitations, yet if there had been a sufficient fraudulent concealment—I do not say what it is or what action it applies to—then he cannot set up the defence which is given to him either under the Act of 1888 or the other Act

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—namely, that the transaction occurred six years before the date of the writ. It seems to me, therefore, that as regards this 35,000l., these gentlemen can rely on the Statute of Limitations, because they are gentlemen who were trustees under a trust arising by implication of law within the meaning of the Act of 1888.

As regards Brock, I agree with what the Lords Justices have said—he thought he was acting in the best interests of the company, but he did that which was *ultra vires*, that which he cannot justify, and therefore he must be made liable with the other two.

Solicitors : *Phelps, Sidgwick & Biddle*, for the Appellant.

*Linklaters ; E. C. Rawlings ; W. D. Cunningham ;
Snow, Snow & Fox ; Beaumont, Son & Rigden ; A. F.
Church*, for the Respondents.

ROUSE v. BRADFORD BANKING CO.

1894, Jan. 15, 16, 17; Feb. 8, 20. LINDLEY, KAY, AND

A. L. SMITH, L.JJ.

Partnership—Retirement of One Partner—Discharge of Debts by continuing Partners—Novation—Principal and Surety—Giving Time to Principal Debtors—Discharge of Surety.

An intention to look to some or one of several debtors for payment does not of itself show a novation whereby the others or other are released.

A firm was indebted to its bankers for an overdraft, and the partners were jointly as well as separately liable for the debt. The bank was entitled to a lien on the shares of any of its members who were indebted to it. A member of the firm was a shareholder in the bank. The partnership having expired, one partner retired, the debt to the bank being still in existence. The business was carried on by the other partners, but no new partner was introduced. On the retirement a deed of dissolution was executed by the retiring and the continuing partners. This deed provided for the carrying on of the business by the other partners, and for the retiring partner's capital being retained in the business. It also contained a release and assignment of his share and interest in the assets to his co-partners, and a covenant by him to confirm whatever they might do in the way of dealing with or realising the assets, and a covenant by the continuing partners with the retiring one to pay the debts with all convenient speed, and to indemnify him against the partnership debts and liabilities, but he was not to be entitled to require payment of any of those debts so long as he was so indemnified.

The bank was aware of the substance and general effect of this deed when at a subsequent time it agreed (i.) to allow an increased overdraft to the new firm, for whom it had opened a new account in its books, such increased overdraft to include the old overdraft; (ii.), not to enforce payment of this increased overdraft for a specified time. The partner who had retired was not consulted in the matter of this overdraft, nor did the bank reserve its rights against him. When he claimed his dividends on his shares in the bank, the latter asserted its lien thereon in respect of the old overdraft:—

Held, that there had not been any novation, and that the bank had not agreed to discharge the retiring partner, and to look to the new firm alone for payment.

But (KAY, L.J., dissenting) that the bank's lien still existed on the ground that the deed of dissolution itself empowered the continuing partners to enter into the agreement by which the bank gave them time to pay the increased overdraft.

Semble—per LINDLEY and KAY, L.JJ., *Oakeley v. Pasheller* (1), taken together with decisions following it, laid down that where co-debtors become as between themselves principal and surety, and the creditor is informed of it, the rules as to dealing with a principal debtor to the surety's prejudice are applicable whether the creditor assented to the new arrangement or not. *Swire v. Redman* (2) commented on.

(1) 4 Cl. & F. 207; 10 Bli. N. S. 548.

(2) 1 Q. B. D. 536; 25 L. T. 470; 24 W. R. 1069.

THIS was an appeal by the defendants, the Bradford Banking Co., Limited, against a decision of Kekewich, J., declaring the plaintiff, William Rouse, entitled to fifty-five shares in the defendant company free from any lien or charge in favour of the company.

The company was an old banking Company, registered as a limited company under the Companies Act, 1862. The plaintiff was a duly registered shareholder in that company, in respect of fifty-five shares, and he held those shares when he became indebted to the company as hereinafter mentioned. By the company's articles of association the company was entitled to a lien on the shares of those members who were indebted to it.

The company had at one time a lien on the plaintiff's shares in respect of a debt of about 55,000*l.*, since reduced to 34,269*l.* 15*s.* 8*d.*, and the question which had arisen was whether the company had, by the following transactions, lost its lien for the unpaid balance.

In 1870 the plaintiff and three other persons became partners as worsted spinners and manufacturers, and carried on business in partnership under the name of William Rouse & Co. The firm opened an account with the defendant bank, and by a deed dated 9 May, 1878, the plaintiff and his co-partners covenanted jointly and severally with the bank to pay what might be, or become, due to the bank from the firm on its banking account, and the plaintiff and his co-partners mortgaged their partnership property to the bank to secure the like sum. After this the firm became considerably indebted to the bank, and, at the end of 1884, the balance due from the firm to the bank amounted to 55,000*l.*, or thereabouts. Under the covenants contained in the deed of May, 1878, the plaintiff was liable, severally as well as jointly, to the bank for the payment of this sum. On 31 December, 1884, the partnership expired by effluxion of time, and the plaintiff retired from the firm. Its business was, however, continued by the other partners under the old name, and no new partner came in. On 17 April, 1885, a deed of dissolution was executed by the plaintiff and his late co-partners. The deed recited the articles of partnership and the expiration of the partnership by effluxion of time on December 31, 1884, and that it had been agreed that the plaintiff should withdraw from the business as from that date, and that the other partners should carry it on, and that notice of the dissolution should be advertised, and that an account had been taken and the

plaintiff's share in the capital and effects of the partnership had been ascertained to amount to 2,669*l.* 8*s.* 4*d.*, and that the plaintiff had agreed to assign his share and interest in the partnership assets to the continuing partners, and that they had agreed to indemnify him from the partnership debts and liabilities, and that they had agreed to execute mutual releases, and that the plaintiff had agreed to leave the said sum of 2,669*l.* 8*s.* 4*d.* in the business. The deed then contained a release and assignment of his share and interest in the assets to his co-partners, and a covenant by him to confirm whatever they might do in the way of dealing with or realizing the assets, and a covenant by the continuing partners with the plaintiff to pay with all convenient speed, and to indemnify him against, the partnership debts and liabilities, but it was expressly provided that the plaintiff should not be entitled to require payment of any of those debts so long as he should be so indemnified. The deed then contained a mutual release of all partnership claims and demands, and a covenant by the continuing partners with the plaintiff to pay him the said sum of 2,669*l.* 8*s.* 4*d.*, with interest at five per cent., with a proviso that the plaintiff should not require payment for five years from the date of the deed, if the continuing partners, or any of them, should so long live and continue to carry on the business of the firm, and to pay the interest regularly.

On 21 April, 1885, a notice of the dissolution, dated 9 February, 1885, was inserted in the *London Gazette*. This notice was signed by the plaintiff and by his late co-partners. It stated the dissolution on 31 December, 1884, and that all debts due to and from the late firm would be received and paid by the continuing partners, who would continue to carry on the business on their own account under the old name of William Rouse & Co. The defendant company was informed of these arrangements. It was admitted that the company knew of the notice in the *Gazette*, but it was urged that the company knew no more than they learnt from the *Gazette*. The Court said that there was no distinct evidence to show what the defendant company did or did not know, but that having regard to what took place on the trial before Mr. Justice KEKEWICH, it must be taken that it was conceded before him that the bank knew the substance and general effect of the terms of the dissolution; and, under these circumstances the Court of Appeal ought to deal

with the case as if it were proved that the defendant company knew that the continuing partners were to take over the assets and liabilities of the old firm, and were to pay and indemnify the plaintiff against those liabilities, including the debt to the bank. The new firm continued to bank with the defendant company, and a new account was opened with the new firm. The old debt of 55,000*l.* was, however, not brought forward into this new account, but was always kept separate and distinct. The bank charged the new firm compound interest on the old debt and commission ; but, on the other hand, allowed the new firm interest on its new account, which was always in credit. The balance, however, of interest and commission thus arrived at was added to the old debt, which in February, 1889, amounted to 67,000*l.* The amount standing to the credit of the new account was 17,000*l.*, so that, if this were set against the 67,000*l.*, 50,000*l.* would be due to the bank. 50,000*l.* was the normal limit of the overdraft allowed by the bank. In February, 1889, the new firm wanted a further advance of 3,000*l.* i.e., to increase the overdraft to 53,000*l.*, and Mr. J. F. Rouse, one of the partners, applied for an overdraft of 53,000*l.* accordingly until 14 March. On 16 February, 1889, the bank agreed with the new firm, upon certain conditions, which were complied with, to allow them an overdraft of 53,046*l.* and not to enforce payment of this overdraft, which included the old debt, until 14 March. The plaintiff was not consulted in this matter, and the Court held it to be clear that the bank did not reserve its rights against him. In July, 1890, the new firm again applied to the bank for assistance, and in August, 1890, the bank agreed to make the firm further advances to the extent of 18,000*l.* on receiving certain guarantees from two other gentlemen. The securities taken by the bank on this occasion were dated 11 August, 1890, and were, in substance, agreements by the new firm and the sureties to pay one day after demand all moneys due from the new firm to the bank, with a proviso that the liability of the sureties should be limited to 2,500*l.* each, and should cease as soon as the liability to the bank should be reduced to 45,000*l.* These securities did not otherwise refer to or affect the old debt, for which alone the plaintiff was responsible. On 16 September, 1892, the new firm stopped payment, and executed a deed for the benefit of their creditors. Under this

deed the bank claimed to prove as joint creditors for the amount due to them. The proof was at first disputed, on the ground that the bank's right to prove was not against the joint estate of the new firm, but only against the separate estates of the partners. The proof was ultimately admitted, and the bank received a dividend of 10s. in the pound on their debt. A considerable sum, however, still remained due to the bank, and it was admitted that there was still due in respect of the old debt more than the value of the plaintiff's shares. The plaintiff claimed payment of the dividends on his bank shares, but the bank set up its lien.

KEKEWICH, J., having held that the plaintiff was released from his liability to the bank in respect of the old debt, the bank appealed.

Finlay, Q.C., Warmington, Q.C., and Vernon R. Smith, for the appellants :

The bank did not give up its lien, or in any way agree to look only to the new firm in discharge of the old partner. Nor did the agreement to give the new firm up to 14 March, 1889, release him. He was a principal debtor, and his retirement did not constitute him a surety merely. *Oakeley v. Pasheller* (1), did not decide in favour of allowing principal debtors to alter their positions and liability towards their creditor without the latter's consent; *Suire v. Redman* (2), *Maingay v. Lewis* (3), *Overend, Gurney & Co. v. Oriental Financial Corporation* (4), *Dane v. Mortgage Insurance Corporation* (5), *In re Sherry* (6), *David v. Ellice* (7), *Thompson v. Percival* (8), *Oakford v. European Steam Shipping Co.* (9), *Davidson's Prec.* 3rd. ed. p. 520.

Renshaw, Q.C., and F. Thompson, for the respondent :

After the dissolution deed the retiring partner was no longer a

(3) Ir. R. 5 C. L. 229; reversing Ir. R. 3 C. L. 495.

(4) L. R. 7 H. L. 348; 31 L. T. 322; affirming L. R. 7 Ch. 142; 41 L. J. Ch. 332; 25 L. T. 813; 20 W. R. 253.

(5) 9 B. 96; [1894] 1 Q. B. 54; 63 L. J. Q. B. 144; 70 L. T. 83; 42 W. R. 227.

(6) 25 Ch. D. 692; 53 L. J. Ch. 404; 50 L. T. 227; 32 W. R. 394.

(7) 7 D. & R. 690; 5 B. & C. 196; 1 C. & P. 368.

(8) 5 B. & Ad. 925; 3 N. & M. 167; 3 L. J. K. B. 98.

(9) 1 Hem. & M. 182; 9 L. T. 15.

principal debtor, but only a surety; *Burnett v. Lynch* (10), *Wolveridge v. Steward* (11), *Moule v. Garrett* (12). By giving time to the principal debtors, that is, to the continuing partners, to pay the increased overdraft, without reserving its rights against the surety, the bank released the surety; *Wilson v. Lloyd* (13), *Davies v. Stainbank* (14), *Bailey v. Edwards* (15), *Pooley v. Harradine* (16), *Greenough v. McClelland* (17), 19 & 20 Vict. c. 97; *In re M' Myn* (18).

The case is governed by *Oakeley v. Pasheller* (1).

Cur. adv. vult.

LINDLEY, L.J., stated the facts and said: The only question is whether the plaintiff is still liable to the bank for the unpaid balance of the old debt. The plaintiff contends that he is not, and that he has been discharged. First, he says that there has been a novation—i.e., a substitution of debtors—and that the bank has agreed to look to the new firm alone for payment and to discharge him. Secondly, he says that, even if this be not so, he became in April, 1885, in the position or character of a surety only for the debt of the new firm, and that the bank knew this and discharged him by agreeing to give time to the new firm in February, 1889, and again in August, 1890, without consulting the plaintiff and without reserving their rights against him. Mr. Justice KEKEWICH decided against the plaintiff on the first point, but in his favour on the second. The learned Judge held that the case of *Oakeley v. Pasheller* (1), was conclusive on the last point. Both points having been again raised before us, it is necessary to allude to them.

First, as to novation. The question whether a creditor of two or more persons has released one of them, and converted the others into his sole debtors by what is called novation is a question of inten-

(10) 8 D. & R. 368; 5 B. & C. 589.

(11) 1 C. & M. 644.

(12) L. R. 5 Ex. 132; 39 L. J. Ex. 69; 22 L. T. 343; 18 W. R. 697; affirmed, L. R., 7 Ex. 101; 41 L. J. Ex. 62; 26 L. T. 367; 20 W. R. 416.

(13) L. R. 16 Eq. 60; 42 L. J. Ch. 559; 28 L. T. 331.

(14) 6 De G. Mac. & G. 679.

(15) 4 B. & S. 761; 34 L. J. Q. B. 41; 9 L. T. 646; 12 W. R. 337.

(16) 7 E. & B. 431; 26 L. J. Q. B. 156; 5 W. R. 405.

(17) 2 El. & El. 424; 30 L. J. Q. B. 15; 2 L. T. 571; 8 W. R. 612.

(18) 33 Ch. D. 575; 55 L. J. Ch. 845; 55 L. T. 834; 35 W. R. 179.

tion, and an intention to look to them for payment, especially when requested to do so by their co-debtor, is quite consistent with an intention to look to them as a mere matter of convenience without releasing him. To succeed on this ground, what the plaintiff has to prove is conduct inconsistent with a continuance of his liability, from which conduct an agreement to release him may be inferred. The last case on this point is *In re Head* (19), but it is unnecessary to cite authorities upon it. The bank had a lien on the plaintiff's shares, and those shares were valuable. It does not, therefore, seem at all probable that the bank should intentionally give up this security, which would be the result of discharging the plaintiff, unless care was taken to prevent such a result. Dealing with the new firm, and treating them as debtors, and proving against their estate is quite consistent with not releasing the plaintiff. All the partners in the new firm were liable to the bank for the old debt, and in proving against their estate the bank was only doing its best to reduce the plaintiff's liability. Such proof does not, as a matter of law, discharge (see *Sleech's case* (20), and *Harris v. Farwell* (21), where a new partner had come in). No doubt there are cases in which a creditor of a firm, one member of which has retired, has, by dealing with the continuing partners and by proving on their bankruptcy against them, shown an intention to look to them alone, and has furnished evidence of an agreement to do so. *Hart v. Alexander* (22), and *Bilborough v. Holmes* (23), were cases of this sort. But in both of these cases new partners had come in, and in the last of them the proof was for money lent by the creditors to the new firm.

Considering that in the present case the old debt was always kept separate and distinct, that no new partner became liable for it, that no new security was ever obtained for it, and that there is really nothing like proof of any intention to release the plaintiff, as distinguished from an intention to obtain payment, if possible, from his co-debtors, I am of opinion that the plaintiff fails to establish that

(19) 3 R. 712; [1893] 3 Ch. 426; 63 L. J. Ch. 35; 69 L. T. 753; 42 W. R. 55.

(20) 1 Mer. 539; 15 R. R. 155.

(21) 15 Beav. 31.

(22) 2 M. & W. 484; M. & H. 63; 7 C. & P. 746.

(23) 5 Ch. D. 255; 46 L. J. Ch. 446; 35 L. T. 759; 25 W. R. 297.

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he has been discharged by any agreement, express or implied, by the bank to look to the new firm, and to the new firm only, for the payment of the old debt.

I pass now to consider the more difficult question whether the bank discharged the plaintiff by what took place in February, 1889. It must be taken that the bank knew of the nature of the arrangement come to between the plaintiff and his co-partners when he retired. Further, there can be no doubt, from the terms of the resolution of 16 February, 1889, and the letter of 18 February, 1889, that the bank agreed to give the new firm time to pay the old debt until 14 March, and that there was a sufficient consideration for this agreement to render it binding on the bank. Lastly, it is clear that the plaintiff was not consulted in this matter, and that the bank did not reserve its rights against him. But it is urged by the bank that the terms of dissolution were such as to authorize the new partners to obtain time, if necessary, to pay the old debt, and that, therefore, even if the plaintiff was in the position of a surety, he was not discharged by what was done. It was further contended that the plaintiff's position always was that of a principal debtor primarily liable, and not that of a surety, and that he was not, therefore, discharged by the agreement to give time. One of the main objects, if not the primary object, of the deed of dissolution was to enable the continuing partners to carry on the business of the old firm, and so to pay off the plaintiff; and, the better to enable them to do so, the plaintiff expressly agreed not only to give them five years at least to pay him his capital, but also not to require them to discharge the liabilities of the old firm so long as he was not himself called upon to pay them. The proviso following the covenants to pay, and indemnify the plaintiff against, the partnership debts clearly, in my opinion, amounts to an agreement by the plaintiff to the effect I have stated. Any other construction of the proviso would, I think, defeat the object which the partners had when they inserted the proviso in this deed. The object and provisions of this deed lead me to infer that the plaintiff impliedly authorised his co-partners to make any arrangements with the creditors of the old firm which might be necessary to gain time for payment of its debts, provided, of course, that the pecuniary liability of the plaintiff was

not increased. The principal debt of the old firm was the debt due to the bank, and it was obvious to the plaintiff, as well as to his co-partners, that, if the bank pressed for payment and could not be induced to give time, one of the main objects of the plaintiff himself would be defeated. When, therefore, the continuing partners did induce the bank to agree to give them time for payment, they were only doing that which the plaintiff had impliedly authorized, and when the bank agreed to give them time the bank did nothing which was in any way inconsistent with the plaintiff's rights under the deed, which, it is contended, put him in the position of a surety. The bank's conduct did not, therefore, discharge him. This view of the case was not presented to Mr. Justice KEKEWICH, and is not alluded to in his judgment. In my opinion, however, the above view of the dissolution deed is correct, and, if correct, it is conclusive against the plaintiff. Indeed, I am of opinion that the mere agreement by the plaintiff not to require payment of the partnership debts and liabilities by his co-partners would of itself prevent his discharge by a creditor who agreed to give them time. I cannot myself see how, in the face of such an agreement, giving time could discharge him. The express agreement necessarily involves an agreement not to call upon the principal creditor to require payment of his debt, but the ground on which a surety is discharged by an agreement to give time is that he is deprived of this right without his consent. See per Lord HATHERLEY in *Overend, Gurney & Co. v. Oriental Financial Corporation* (4). If he has himself agreed not to exercise this right this reasoning is inapplicable. It is urged that the surety might himself pay off the principal debt and then sue the debtor, and reliance was placed on the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 5. But if the surety were to do this before he was himself required to pay he would, in my opinion, be acting contrary to the agreement expressed in the proviso I am considering. It may be said that if the principal creditor agreed to give the debtor time he could still sue the surety, who would then have a right to require the creditor to sue the principal debtor. But it would be a gross breach of faith on the part of the creditor, and, in truth, a breach of his agreement with the debtor, if the creditor were to sue the surety and put him in motion against the debtor until the expiration of the indulgence agreed to be given him; and

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there is ample authority for saying that this cannot be done. Lord HATHERLEY, in *Overend, Gurney & Co. v. Oriental Financial Corporation* (4), expressly said: "If you agree with the principal to give him time, it is contrary to that agreement that you should sue the surety, because if you sue the surety you immediately turn him upon the principal, and therefore your act breaks the agreement into which you have entered with the principal." Statements of the law to the same effect will be found in the judgments in *Davies v. Stainbank* (14). No case has yet decided that a surety has been discharged by an agreement by the principal creditor to give time to the debtor, where the surety had himself agreed not to require the debtor to relieve him until he was himself sued, and, for the reasons I have given, the law does not go that length. But, be this as it may, the dissolution deed in this case contains clauses which, with the proviso, remove whatever doubt there might be if the proviso stood alone, or were in a deed framed to carry out other objects.

It was strenuously argued before us that this case was concluded in favour of the plaintiff by *Oakeley v. Pasheller* (1). But the foregoing observations, if well founded, take this case out of the rule established, or supposed to be established, in that case, and render it wholly inapplicable to the present. In *Oakeley v. Pasheller* (1), Sherard and Reid were partners. Sherard died. Reid took in a new partner, Kynaston; and it was then agreed between Sherard's executors and Reid and Kynaston that Reid and Kynaston should continue the business, take over the assets, and indemnify Sherard's estate from the partnership debts and liabilities. These included a liability for 10,000*l.* to Oakeley, who held joint and several bonds for that amount, given by Sherard and Reid, and which were not then due. Oakeley was father-in-law to both Reid and Kynaston, and Oakeley's son was one of their clerks. It was clear that Oakeley knew all about the arrangement between them and Sherard's executors. For years Reid and Kynaston paid Oakeley interest on his debt of 10,000*l.*, and he clearly looked to them for payment of the principal. The new firm contracted a new debt to him, and the old and new debts were blended together in its accounts with him. Moreover, on several occasions he gave them time to pay the old debt, and,

on one occasion, in particular in 1817, he agreed to give them three years' time. The old debt was also referred to in the correspondence between him and the new firm as a loan to it. On one occasion (in 1823) when Oakeley required further security, he, at the request of Reid and Kynaston, deliberately abstained from communicating with Sherard's executors for fear they should enforce their indemnity against the new firm. Reid afterwards died, and his estate was insufficient to pay his debts. Shortly afterwards Oakeley assigned Sherard's bonds to trustees, and, Oakeley having himself died, these bonds were sought to be enforced against Sherard's estate. This led to a suit by his executors to restrain proceedings on the bonds, and the Master of the Rolls, in the first instance, and Lord BROUGHAM on appeal, and, finally, Lord LYNTHURST and Lord COTTENHAM in the House of Lords, decided that Sherard's estate had been discharged by the agreement to give time in 1817, and an injunction was granted accordingly. Oakeley's knowledge and conduct clearly warranted the inference, not only that he knew of the arrangement come to between Sherard's executors and the new firm, but that, knowing such arrangement, he himself acceded to it, and consented to treat Reid and Kynaston as his principal debtors, and Sherard's executors as sureties only. Of course, if this were the view taken of the facts, the decision would present no difficulty, for it would be quite obvious that, by agreeing to give three years' time to Reid and Kynaston, Sherard's executors would be discharged. This view of the decision is, I confess, the view I should myself adopt, but it is undeniable that *Oakeley v. Pasheller* (1) has been regarded as going a step further, and as deciding that knowledge only on the part of the creditor of the arrangement come to between his own debtors is enough to compel the creditor to recognise that arrangement, and to prevent him from dealing with them regardless of it. This was clearly the view taken of *Oakeley v. Pasheller* (1), by Vice-Chancellor WOOD in *Oakford v. European Steam Shipping Co.* (9), by Lord CAIRNS in *Overend, Gurney & Co. v. Oriental Financial Corporation* (4), and by a majority of the Judges in the Irish Court of Exchequer Chamber in *Maingay v. Lewis* (3). In *Oakford v. European Steam Shipping Co.* Vice-Chancellor WOOD declined to extend *Oakeley v. Pasheller* (1), but nevertheless said that it determined "that where a creditor had two joint principal debtors

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and was entitled, if he found it convenient, to give time to the one and to press the other, an agreement between the debtors might so affect him as to deprive him of that right. That was a strong decision, and it went upon the footing that the creditor, having notice of the agreement, was bound to regard it." It cannot, I think, be denied that the view there taken of *Oakeley v. Pasheller* (1), whether rightly or not, has led to decisions which now, at all events, have resulted in establishing the proposition above stated. In *Swire v. Redman* (2), it is true that the Court of Queen's Bench did not adopt the same view of *Oakeley v. Pasheller* (1) as that taken by other Judges in the cases to which I have referred, and the Court deliberately refused to hold that a creditor of several persons primarily liable to him as principals was not at liberty to deal with them as such simply by being informed that since their obligation to him had been contracted they had agreed amongst themselves that one of them should be indemnified by the others. But, after the decision of the House of Lords in *Overend, Gurney & Co. v. Oriental Financial Corporation* (4), the decision in *Swire v. Redman* (2) cannot, I think, be supported upon the grounds on which it was mainly rested. The implied authority, however, given by the retired partners to the continuing partners to carry on business in the way in which he and they had been in the habit of carrying it on, was sufficient to support the decision in that case, as, indeed, the Court itself pointed out at the end of the judgment. Notwithstanding the reasonings of the Court in *Swire v. Redman* (2), which I should adopt and follow if I were free to do so, I am driven to the conclusion that now, at all events, the law has come to be what Vice-Chancellor Wood and Lord CAIRNS said it had been decided to be in *Oakeley v. Pasheller* (1). I have already stated Vice-Chancellor Wood's view. Lord CAIRNS said that, after that case, "it is impossible to contend if, after a right of action accrues to a creditor against two or more persons, he is informed that one of them is a surety only, and after that he gives time to the principal debtor, without the consent and knowledge of the surety, that under those circumstances the rule as to the discharge of the surety does not apply." Notwithstanding *Swire v. Redman* (2), I find it impossible to draw any satisfactory distinction between the case of a debtor primarily liable

and afterwards becoming in the position of a surety, with the knowledge of the creditor, and the case of a person who is a surety, and who makes himself primarily liable to a creditor, who does not know that his debtor is a surety, but is afterwards informed of that fact. The House of Lords having decided that the rule as to the discharge of a surety applies to the last case, I am unable to hold that it does not apply to the first, and, in truth, the Lords decided that it applied to the second case, because, in their view, it had already been decided to apply to the first.

I have been induced to make these observations on *Oakeley v. Pasheller* (1) because the present case was argued as if it turned on what was there really decided, and because this was the view taken by Mr. Justice KEKEWICH, and the correctness of his view of that case was impeached before us. But, for the reasons given in the earlier part of my judgment, the rule supposed to have been there laid down, and which, however it originated, I take to be now law, is inapplicable to the present case. The terms of the dissolution deed exclude the application of the rule in question. In my judgment, the bank has not discharged the plaintiff and is still entitled to the lien which it claims on his shares. The appeal therefore must be allowed. Judgment must be given for the defendants, both on the claim and on the counter-claim, and it must be declared that they are entitled to the lien which they claim on the fifty-five shares of the plaintiff. If an account is wanted of what is due to the bank in respect of its lien, liberty to apply in Chambers for such an account must be reserved, but the plaintiff, being in the wrong, must pay the costs here and below.

KAY, L.J., stated the facts, and referring to the bank's agreement to allow the new firm, on certain terms, an overdraft of 54,036*l.* until 14 March, 1889, said: I think this was a binding agreement for consideration not to enforce payment of the 54,036*l.* before 14 March. The effect upon the plaintiff was that he could not before that time exercise his right of requiring the creditor to enforce payment by the principal debtor, nor, if in the meantime he had paid to the bank the amount, could he have sued the principal debtors in the name of the bank until after 14 March. There was therefore that alteration in his position which *prima facie* would

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discharge him. But this would not interfere with his right of suing upon the covenant by his former partners to indemnify him, which was contained in the deed of dissolution. Does this make any difference? I think that question is answered by *Oakeley v. Pasheller* (1). This is the authority upon which the learned Judge in the Court below has founded his decision, and it is necessary to examine it carefully. Two persons, George Reid and Philip Cartel Sherard, were partners in a firm of George Reid & Co. They became indebted for 10,000*l.* to Sir Charles Oakeley, who held their joint and several bonds for the amount. Sherard died. Reid carried on the business for himself and Sherard's executors until the end of the partnership term. The determination of the partnership by effluxion of time was gazetted, and Reid then took a partner named Kynaston, who was a son-in-law of Sir Charles Oakeley. On 8 June, 1818, a deed was executed between Reid, the executors of Sherard, and Kynaston, by which, in effect, Reid and Kynaston purchased all the executors' interest in the business for a large sum of which a small part was to be paid and the rest secured, and they covenanted to give a bond in 150,000*l.* to indemnify the executors against the debts of the concern, which included the 10,000*l.* due to Sir Charles Oakeley. In 1817, an arrangement was made under which Sir Charles Oakeley was to take an interest in the new firm, and he at the same time engaged not to call upon them for their debt to him of 10,000*l.* for three years. The Master of the Rolls, Sir J. LEACH, held, that this discharged the estate of Sherard, saying this: "In 1817, Sir Charles Oakeley entered into an agreement with the two persons who had become, as between themselves and the estate of Sherard, the principal debtors, he enters into an arrangement with them to give three years' time for the payment of the demand, and I am of the opinion, to be collected from what I have already stated, that Sir Charles Oakeley could not either proceed within these three years against the principal debtor or against the surety in respect of that demand, and if he could not proceed against either of them in respect of the demand, then the surety is released, and the surety is released for this reason, because, whatever the surety pays, he has a right to call on the principal debtor to repay the sum which he has so advanced, but if there be a delay

for three years, he may be prejudiced by that delay, because in the interim the solvent principal debtor may become an insolvent principal debtor, and then by an act of the creditor, the surety would have lost his remedy against the principal debtor.

"I am therefore of opinion," continued the Master of the Rolls, "that the giving time for three years in 1817 did discharge the estate of Philip Sherard. I consider it did discharge him, being of opinion that Sir Charles Oakeley well knew in 1817 that by the arrangement between the two partners, Reid and Kynaston, they had become the principal debtors and Sherard's estate surety only."

This decree was affirmed by Lord BROUGHAM, L.C., but his judgment we have not been able to obtain. It was then appealed to the House of Lords, and was there again affirmed by Lord COTTENHAM, L.C. and Lord LYNTHURST. During the argument Lord LYNTHURST asked: "How will an arrangement between debtors affect a creditor unless he adopts it? Can the parties alter their situation with respect to the creditor without his assent?" The argument answers this, first, by saying that notice of the new arrangement is enough, and that having that notice he is bound so to conduct himself as not to affect the surety. This argument seems to have been accepted, for in giving judgment, Lord LYNTHURST stated that an arrangement was made between Sir Charles Oakeley and Kynaston, without any communication with the executors of Sherard, to extend the time of payment for a period of three years, and the question was, what was the effect of that extension, whether it discharged the representatives of Sherard; and his Lordship continued: "Now in consequence of an arrangement which took place between the representatives and the new partnership, they stood in the character of sureties; and the principle of law is this, that where the creditor gives time to the principal, there being a surety, without any communication with the surety, and without the consent of the surety, it discharges him from liability, because it places him in a new position, and exposes him to risk and contingencies which he would not otherwise be liable to. This being the fact in the present instance, and as the facts bring home the knowledge of all the circumstances of the transaction to Sir Charles Oakeley, it is my opinion that the representatives of Sherard were discharged from their liability." The circumstances that the executors had a covenant of indemnity upon which they might have

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sued Reid and Kynaston directly, without using Sir Charles Oakeley's name, was not treated as altering the application of this law. The case seems also to decide that where persons who are jointly and severally liable to a creditor, all being originally in the position of principal debtors, by a subsequent arrangement provide as between themselves that some of them shall take the burden of the debt, and indemnify the others against it, this arrangement puts the debtors, who are to be so indemnified, in the position of sureties as between themselves and their co-debtors. It further decides, apparently, that if this alteration of the position of his debtors *inter se* becomes known to the creditor, and he thereafter gives time to the debtors who have assumed the position of principal debtors, this will discharge those who have become sureties. On this last point, however, a serious difference of opinion has been intimated by distinguished Judges. It seems to be founded upon the question asked by Lord LYNTHURST during the argument in the House of Lords, which I have already quoted. Can the debtors alter their position with respect to the creditor without his assent? Must it not be shown that he adopts the arrangement between them? Unquestionably, no assent by the creditor is wanted to render valid an arrangement among the debtors that some of them shall pay the debt and indemnify the others against it. It would be absurd to say that joint debtors cannot make such an arrangement among themselves, without the assent of their creditor. But what is meant, is that the creditor may disregard the arrangement, unless he not only knows it, but also agrees to be bound by it. That is unless he so agrees, he may alter the position of a debtor, who, as he knows, is a surety, by giving time to the other debtors without discharging him. But when he agrees to give time, he may reserve his rights against the surety, and then the surety will not be discharged, *Owen v. Homan* (24). The only additional burden thrown on the creditor is the necessity of not dealing separately with the principal debtor, so as to injure the surety without expressly declaring that he does not release him. Such a reservation, when giving time to the debtor, would mean that the creditor engages not to sue within the time so given, unless compelled to do so by the surety.

(24) 4 H. L. Cas. 997; 1 Eq. R. 370; 17 Jur. 861.

It was always the law, that if the creditor knew that the debtors to him were, as between themselves, in the position of principal debtor and surety, whether he knew this at the time when the debt was contracted or discovered it afterwards, that knowledge obliged him not to deal with the principal debtor alone so as to prejudice the surety. Lord COTTENHAM, in *Hollier v. Eyre* (25), expressly says: "Although all the grantors were principals as between them and the grantees, yet as between themselves some of them might be sureties for others, and if it was established that such was the case as between " them " and that the grantees knew that such was the case, they might by their dealing with " the principal debtor " have raised an equity in favour of " the surety. And he proceeds to say that, to affect the creditor with this equity, he must have that notice at the date of the transaction by which the position of the surety is altered.

Can it be the law that if by a subsequent agreement one of the principal debtors becomes a surety, and this is made known to the creditor, he may disregard it? The difference between that case and the creditor discovering after the debt was contracted that one of the debtors was at the time of contracting the debt as between himself and his co-debtors only a surety seems to me inappreciable. It is only the knowledge by the creditor of the surety's position which affects him in that case, and why it should not equally affect him in the other, I confess I cannot comprehend.

In *Ex parte Graham* (26) the indorsee for value of a bill of exchange had notice, after the indorsement to him, that it had been accepted for the accommodation of the drawer, and after this notice he joined the other creditors of the drawer in a composition arrangement and released the drawer. Subsequently he sought to prove against the acceptors, who had become bankrupt. Lord Justice KNIGHT-BRUCE asked if the question was not unaffected by decision. Counsel seem to have thought it was. *Oakeley v. Pasheller* (1) was not cited. The proof was allowed.

In *Oakford v. European Steam Shipping Company* (9), Vice-Chancellor WOOD said of *Oakeley v. Pasheller* (1): " That case determined that where a creditor had two joint principal debtors

(25) 9 C. & Fin. 1.

(26) 5 De G. M. & G. 356.

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and was entitled, if he found it convenient, to give time to the one and to press the other, an agreement between the debtors might so affect him as to deprive him of that right. That was a strong decision, and it went upon the footing that the creditor, having notice of the agreement, was bound to regard it."

In *Overend, Gurney & Co. v. Oriental Financial Corporation* (4) bills of exchange were discounted by the defendants. They were afterwards informed that the acceptors were merely accommodation acceptors, and with that knowledge they bound themselves to give time to the principal debtor. Lord HATHERLEY, L.C., referred to *Ex parte Graham* (26), and to the inquiry made in that case whether there was any authority on the subject, and pointed out that *Oakeley v. Pasheller* (1) was "a precise and direct authority upon the point;" and his Lordship proceeds to say that there is no hardship in the case, because, when giving time, the creditors might reserve their rights against the surety. The case was appealed to the House of Lords, and on the appeal Lord CAIRNS, L.C., is reported as follows: "It was said that the knowledge that the Financial Corporation was surety was not obtained by Overend, Gurney & Co. until after the bills became due, and inasmuch as the contract arising out of and connected with the bills was made before Overend, Gurney & Co. had any knowledge of that suretyship, their rights and their powers of proceeding under the contract ought not to be interfered with in consequence of knowledge subsequently obtained. My Lords," the Lord Chancellor continued, "it appears to me that after the case which was referred to at the Bar decided by your Lordships' House, that of *Oakeley v. Pasheller* (1), it is impossible to contend, if after a right of action accrues to a creditor against two or more persons, he is informed that one of them is a surety only, and after that he gives time to the principal debtor without the consent and knowledge of the surety, that under those circumstances the rule as to the discharge of the surety does not apply."

It is clear that Lord HATHERLEY and Lord CAIRNS understood *Oakeley v. Pasheller* (1) to have decided that the mere knowledge of the creditor that one of his debtors has become surety as between him and the other obliges the creditor not to deal with the prin-

cipal debtor alone so as to prejudice the surety. Both those learned Judges treat this as the law, whether the debtors were originally in that position and the creditor was afterwards informed of it, or whether by a subsequent arrangement between themselves they were put into that position and the creditor was informed of the change.

We have obtained the cases and appendix of *Oakeley v. Pasheller* (1) before the House of Lords, and I find it stated in the appellants' case that Sir Charles Oakeley was unaware of the arrangement for indemnity of Sherard's executors, and that when he gave time in 1817 he reserved his rights against the estate of Sherard. The respondent's case states that the arrangement in 1817 was not known to the executors of Sherard. The appendix contains no evidence of any reservations of rights against Sherard's executors or of any agreement between them and Sir Charles Oakeley to treat them as sureties only.

In *Maingay v. Lewis* (3) the question came before the Court of Exchequer Chamber in Ireland, and the case of *Oakeley v. Pasheller* (1) was carefully considered. PIGOT, C.B., Mr. Justice LAWSON, Mr. Justice MORRIS, and Chief Justice MONAHAN held that giving time to a principal debtor discharged a surety who had become such by an arrangement between himself and the other debtors after the debt was contracted if the creditor was aware of this change of their relative positions before he gave time to the principal debtor. All these Judges treated *Oakeley v. Pasheller* (1) as having decided the point. Mr. Justice LAWSON states the argument against the doctrine (at p. 231), and follows the House of Lords' decision reluctantly. Baron DEASY and Mr. Justice KEOGH differ, because in the case before them they consider time was not given. Baron FITZGERALD is the only Judge who doubts the effect of the case in the House of Lords. He considers that the ground of the decision was the giving time to Kynaston, the new partner, to whom the deceased partner's estate was always, he says, in the position of surety.

In this state of the authorities the question came before the Court of Queen's Bench upon an equitable plea in the case of *Swire v. Redman* (2), which in its facts was identical with what I understand to have been the facts in *Oakeley v. Pasheller* (1).

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There were two principal debtors, Redman and Holt, who were partners. The partnership expired and, by arrangement between them, Holt assumed the position of principal debtor and Redman that of surety. The creditors were informed of this, and after receiving that information gave time to Holt. On an application for a new trial, Baron BRAMWELL having ruled that Redman was not discharged, Lord Chief Justice COCKBURN read the judgment of Lord BLACKBURN. The judgment was to this effect: If a creditor has two debtors, one of whom is not surety for the other, or if he is and the creditor is ignorant of the fact, he may give time to either without discharging the other; but if from the beginning one is principal and the other surety, the case is different. "And if the creditor binds himself not to sue the principal debtor for however short a time, he does interfere with the surety's theoretical right to sue in his name during such period." Though this doctrine, continued the learned Judge, seems "consistent neither with justice nor common sense" (and see observations by the same learned Judge in *Petty v. Cooke* (27)), "it has been long so firmly established that it can only be altered by the Legislature. And as it depends upon the supposed inequity of interfering with the rights which the surety has as between him and the principal debtor, it is not material that the knowledge on the part of the creditor that the surety was from the beginning such, and therefore had such rights, was not acquired till after the surety had become liable to the creditor: *Pooley v. Harradine* (6), *Greenough v. McClelland* (17), and *Overend, Gurney & Co. v. Oriental Financial Corporation* (4).

"This rule, whether it was originally right or not, is no doubt well established. But when, as in the present case, the two debtors are both principals, there is no such right. Redman never could have paid off the plaintiffs and sued Holt in their name, for by the very act of paying off the plaintiffs the cause of action in their name would be gone" (But see, in the case of a surety, 19 & 20 Vict. c. 97, s. 5) "and the right which Redman would have had to sue Holt for contribution would be in no way affected by any bargain which the plaintiffs had made with Holt alone to give him further time.

(27) L. R. 6 Q. B. 790; 40 L. J. Q. B. 281; 25 L. T. 90; 19 W. R. 112.

"The contention is that the two, Redman and Holt, had a right, without the knowledge or consent of the plaintiffs, to create a new state of things, and then, by giving notice, to prevent the plaintiffs from doing that which they lawfully might before—to create a right in themselves, which, if observed, must derogate from the plaintiffs' right, and then to say it is inequitable in the plaintiffs to act in derogation of the right so created. Surely the inequity begins earlier, and is in the defendants derogating from the plaintiffs' right without their consent."

The judgment then deals with *Oakeley v. Pasheller* (1), which the learned Judges refuse to understand in the manner in which it was understood by Lord HATHERLEY and Lord CAIRNS, but they construe it to mean that the new arrangement by which Sherard's executors became sureties was an arrangement to which the creditor, Sir Charles Oakeley, was a party, made between him and the two partners in the new firm, of whom one, Kynaston, was his son-in-law; that is, that Sir Charles Oakeley not merely knew of this arrangement but that he engaged to be bound by it.

There is nothing in the facts of the case as stated, nor in the language of the judgments which I have read, to justify this construction of the decision in *Oakeley v. Pasheller* (1). Lord HATHERLEY and Lord CAIRNS did not so understand it. The question involved in the case was an equitable one, and the opinion of the two Lord Chancellors as to the effect of that decision must have more weight than that of the two learned Judges who decided *Swire v. Redman* (2).

The report of *Overend, Gurney & Co. v. Oriental Financial Corporation* (4) in the House of Lords does not seem to have been before their Lordships, and Lord CAIRNS' construction of that decision is not referred to by them.

Moreover, the value of the decision in *Swire v. Redman* (2) seems to me, if I may say so with all respect, greatly affected by the fact that it is based upon the view that the doctrine of the discharge of a surety by giving time to the principal debtor is "consistent neither with justice nor common sense." It was long ago adopted by Courts of common law. In the language of Chief Justice TINDAL, in *Combe v. Woolf* (28), "Except where a surety has entered into a bond for payment in default of the principal debtor,

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Courts of law as well as Courts of equity have always held the surety to be discharged where, without his assent, time has been given to the principal debtor. Where the surety has entered into such a bond and by a parol agreement time has been given to the principal debtor, the surety is compelled to resort to a Court of equity, because by the rule of law a parol agreement cannot be pleaded in discharge of an instrument under seal."

Moreover, the doctrine has again and again been recognized and affirmed in the House of Lords. See, amongst other cases, *Hearn v. Cole* (29), *Bank of Ireland v. Beresford* (30), *Torrance v. Bank of British North America* (31), *McTaggart v. Watson* (32), *Creighton v. Rankin* (33), *Owen v. Homan* (24).

A criticism of *Oakeley v. Pasheller* (1), which shows so strong a desire not to follow that decision if it be possible to escape from it, must be received with some hesitation. For myself I am bound to say that the decision in *Oakeley v. Pasheller* (1), fairly read, seems to admit of but one meaning, that which was put upon it by Lord HATHERLEY, L.C., and Lord CAIRNS, L.C.—namely, that the information to the creditor of a subsequent arrangement, by which his co-debtors became as between themselves in the position of principal and surety, puts him under the obligation not to deal with the principal debtor so as to prejudice the surety, just as would be the case if the debtors were originally in that position *inter se*, and the creditor discovered it afterwards.

Then it was argued that there was a novation of the debt, by which the continuing partners were accepted as the sole debtors, and the plaintiff, William Rouse, was released. Such a release must be by a contract with William Rouse, expressed or implied. There was no express contract to release him; the argument is that such a contract must be implied from the circumstances of the case. The principal facts relied on to raise this implication are, that, although the bank kept a separate account of the old debt, they charged in that account compound interest, and that, as they

(29) 1 Dow, 459.

(30) 6 Dow, 233.

(31) L. R. 5 P. C. 246; 29 L. T. 109; 21 W. R. 529.

(32) 10 Bligh (N. S.), 618; 3 Cl. & F. 525.

(33) 7 Cl. & F. 325.

must be taken to know that they could not make this charge against William Rouse after they had, by his withdrawal from the business, ceased to act as bankers for him, that fact shows that they treated the continuing partners as alone liable. Moreover, the bank dealt with them only in respect of the debt, and after their bankruptcy the bank proved against their joint estate and received a dividend of 10s. in the pound, which, it is argued, they could not have done if they had not released William Rouse. But this is not a case in which any new partner, not originally liable for the debt, has been treated as liable; all these dealings were with the original joint debtors, or some of them. It is clear that the mere treating the continuing firm as liable, and proving against their estate, is not necessarily inconsistent with preserving their right against the retired partner: *Harris v. Farwell* (21). That joint estate was really the estate which the retired partner made over all his interest in when he retired; and, upon the whole, though with some hesitation, I do not think there is sufficient evidence of an intention to release William Rouse to enable us to decide in his favour on this ground.

But if the true result be that the bank did not intend to release William Rouse, I cannot help feeling great reluctance to lean to the conclusion that he has been released in effect by the inadvertence of giving time to his co-debtors, without reserving the rights of the bank against him. Lord Justice LINDLEY has called attention to the form of the deed of dissolution, and we have heard a further argument upon the question whether, by that deed, William Rouse did not empower his co-partners to make an arrangement for further time without his concurrence, or without discharging him by so doing. The creditor was not a party to this deed, and it cannot be read as giving to him any right against the surety. The deed contains a covenant by William Rouse's former partners to pay the debts of the old firm as soon as they conveniently can, and to indemnify and keep indemnified William Rouse against them, and this covenant is qualified by a proviso worded thus: "Provided always and it is hereby agreed and declared that the said William Rouse, his executors and administrators, shall not be entitled to require payment of any of the said debts or sums of money hereinbefore covenanted to be paid by the said J. F. Rouse, F. Rouse,

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and H. Rouse, so long as the said William Rouse, his heirs, executors, and administrators shall be indemnified according to the covenant last hereinbefore contained." The rights of a surety which are taken away by an agreement not to sue the principal debtor for a certain time are principally these—namely, first, his right to call upon the creditor to compel the principal debtor to pay, for which purpose he might institute a suit in equity; or, secondly, his right to pay the creditor and then to sue the principal debtor in his name, see Mercantile Law Amendment Act (19 & 20 Vict. c. 97), s. 5. The proviso in question does seem to give up the first of these rights so long as William Rouse is indemnified "according to the covenant." But, if the principal debtors do not pay the debt as soon as they conveniently can, they do not fulfil their covenant, and, if they arrange with the creditor not to pay for a certain time, when they could conveniently pay within that time, it seems to me that the proviso would not prevent the surety from using all the remedies in his power. To the second right of the surety which I have mentioned, that of voluntarily discharging the debt and then calling on the principal debtor to repay the amount, the proviso does not in terms apply at all. It is a common form found in Davidson's *Precedents*, vol. ii., part 1, p. 475, 2nd edit. It is there explained by a note thus: "A proviso to this effect should always be inserted, unless it be intended that the covenantor should immediately pay the debts, for where a person sold an estate which was charged with annuities, but which he was not personally liable to pay, and took a covenant from the purchaser to pay the annuities and indemnify the vendor against them, it was held that the vendor could sustain an action for non-payment of the annuities without showing that he had been damnified by the non-payment." The object, then, of this proviso is to prevent this use being made of the covenant to pay the debt and indemnify the surety. It is not intended to deprive the surety of any other of his rights as between him and the creditor or as between him and the principal debtor. I cannot find anything else in the deed which has that effect. When dealing with debts due to the firm there is an express agreement that, with respect to these, William Rouse "will allow and confirm whatsoever" his partners or their executors, administrators,

or assigns shall lawfully do or cause to be done. But there is no like provision as to debts due from the firm. The deed follows in all respects the form given in Davidson's Precedents, and if it be held that this deed authorizes the grantees to arrange with the creditors for time it must follow that in every case of a deed of dissolution in the ordinary form this must be the result. The doctrine that arrangements between the creditor and principal debtor which prejudice the surety have the effect of releasing him is founded on the jealous care which Courts of equity and Courts of law have always taken of a surety's interest. The principle is thoroughly settled. I am not inclined to depart from it or to question its reasonableness if authority permitted. Authority seems to me decisive against this; and, on the whole, I think that the decision in this case should be affirmed.

A. L. SMITH, L.J.: It is not disputed in this case that, unless the plaintiff can establish that the defendants have released him from a debt of some 34,000*l.*, which at one time he undoubtedly owed to the defendants, they are entitled to the lien they set up in the present action.

The way in which the plaintiff seeks to establish that he is no longer a debtor to the defendants is by setting up that they have accepted the liability of a firm which succeeded the plaintiff in business in accord and satisfaction of the plaintiff's debt to them, or in the alternative that, upon the authority of *Oakeley v. Pasheller* (1) in the House of Lords, he is discharged by reason of the defendants having given time to the new firm by a binding contract, for which firm, to the knowledge of the defendants, the plaintiff had become surety.

I have nothing to say upon the first point—viz. the accord and satisfaction, or, as it is called, a release by novation, excepting that I agree that the judgment of Mr. Justice KEKEWICH should be upheld as to this for the reasons given by him and the Lords Justices who have preceded me.

I desire, however, to say something upon the second point, which undoubtedly, as matters stand, is one of great difficulty.

Now it has long since been established that, if a creditor contracts with a principal debtor and a surety, and afterwards, by a binding contract with the principal debtor, he gives time to him without the

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consent and knowledge of the surety and without reserving his rights against the surety, the surety is discharged.

Different reasons for this will be found in the books, given by different Judges; but I apprehend that the main reason is that a surety is entitled at any time to require the creditor to call upon the principal debtor to pay off the debt or himself to pay off the debt, and that, when he has paid it off, he is at once entitled, in the creditor's name, to sue the principal debtor, and if the creditor has bound himself to give time to the principal, the surety cannot do either the one or the other of these things until the time so given has elapsed, and it is said that by reason of this the surety's position is altered to his detriment without his assent.

It was decided in the year 1857 by the Court of Queen's Bench, in *Pooley v. Harradine* (16), that, although upon the face of a document (a promissory note) two persons had contracted with a creditor as principal debtors, yet if one of them, when he so contracted, was in truth only a surety for the other, and the creditor, at the time he took the document, knew this to be so, the creditor could not afterwards give time to the one who was in reality the principal without releasing the other, who was in reality the surety.

It was held that, inasmuch as the relationship of the principal and surety in fact existed to the knowledge of the creditor between the persons contracting with him, though they contracted as principals, an equity arose, which compelled the creditor thereafter to treat the one as the surety, which in truth he then was, and not to give time to the principal debtor without the assent of the surety.

It is true that the creditor could sue the surety upon his contract as principal debtor and that this was not altered, but it is impossible to say, as it was argued before us, that the creditor's position was not altered by the introduction of the equity. Before its introduction the creditor could have dealt with either of his debtors as he liked, after its introduction he could not; for if he gave time to the one, who was in fact the principal debtor, he discharged the other, who was in fact the surety, unless he reserved his rights against him.

The Court in this case forbore from deciding whether this equity would have arisen if the creditor did not know of the position of the surety at the time when he contracted. It is too late to discuss the

ground for or the validity of the equity, for in the case of *Overend, Gurney & Co. v. Oriental Financial Corporation* (4), where the relationship of principal and surety existed when the creditor contracted with his debtors as principal debtors, the House of Lords held it to exist, and decided that it applied, even if notice of the relationship of principal and surety was not conveyed to the creditor until after the contract was made. In this case it was held that a surety was discharged when the creditor believed he was contracting, and did in fact contract with them as principal debtors, if, after the contract was made, the creditor became aware, as the truth was, that he had only contracted with persons who stood in the relationship of principal and surety *inter se*, and that he could not afterwards give time to the one who was the principal debtor without discharging the surety.

It appears to me that the equity which was applied in *Pooley v. Harradine* (16) was applied in this case, with the addition that notice of the true state of facts would suffice if given after the contract was made between the creditor and his debtors, which last point the Court of Queen's Bench had abstained from deciding.

It will be seen that in these two cases (*Pooley v. Harradine* (16) and *Overend, Gurney & Co. v. Oriental Financial Corporation* (4)) the Court gave effect, so far as possible, to what in truth was the real position *inter se* of the persons when they contracted with the creditor, and applied thereto the rule as to the discharge of the surety by giving time to the principal debtor. As I have said before, it is too late to quarrel with equity.

But it was said on behalf of the plaintiff that, as long ago as the year 1892, in the case of *Oakeley v. Pasheller* (1), the Court had gone further, and had held that where a creditor contracts with two who are *de facto* principal debtors *inter se*, they, without the knowledge or assent of the creditor, can afterwards create *inter se* the position of principal debtor and surety, and that the creditor, although no party to such arrangement, upon having notice of it is compelled to recognize this new-made position of principal and surety, and that if the creditor, after such notice, gives time to the principal debtor without the consent or knowledge of the thus created surety, this surety is discharged.

I cannot myself see in such a case where any equity arises.

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If the Court, by the application of an equity, is to give effect, as it did in the two cases above mentioned, to what in truth was the real relationship of the persons *inter se* when they contracted with the creditor, why, if an equity exists, should it not do the like in the present case? Agreeing, as I do, from the cases above mentioned, that it has been held that an equity exists to compel the creditor to give effect to what was the real relationship of the parties *inter se* at the time they contracted with the creditor when that relationship became known to him, why, I ask, should an equity arise for the purpose of giving effect to what was not the real relationship of the parties *inter se* when the contract was made with the creditor?

The real position of persons when they contracted with the creditor in the present case was that of principals *inter se*, and if an equity is to be applied so as to give effect to this true relationship of these persons, it should, as it appears to me, give effect to what the relationship in reality was, which was that of two principal debtors *inter se* and not that of principal and surety.

I can understand its application when the creditor is unfortunate enough to have only a contract with two who, when he contracted with them, were *inter se*—in fact, two principal debtors.

This is a difficulty I have in this case, and which I have not been able to overcome.

No reasons at the Bar have been given why there should be such an equity as is contended for. All that is said is that there is such an equity, because the House of Lords, in *Oakeley v. Pasheller* (1), has decided that it existed, and that two most eminent Judges have since said that it was so decided. If it has been so decided by the House of Lords, of course there is an end of the matter; but whether it has appears to me to be one great question in this case.

Before turning to *Oakeley v. Pasheller* (1), I should point out that in the year 1876 this exact point came up for actual decision in the Queen's Bench Division in the case of *Swire v. Redman* (2), when it was held that two principal debtors could not change their position *inter se* to that of principal and surety so as to affect their creditor without his assent, and that *Oakeley v. Pasheller* (1) had not decided that they could. Baron BRAMWELL had held at *Nisi Prius* that the point taken was untenable.

The Queen's Bench Division, in a considered judgment, which was prepared by the then Mr. Justice BLACKBURN, upheld Baron BRANWELL's ruling.

I cannot myself read this judgment without feeling its force and good sense. This judgment must be erroneous if the House of Lords, in *Oakeley v. Pasheller* (1), has decided what the plaintiffs say it has and which view Mr. Justice KEKEWICH has ratified.

Now I agree that in *Oakeley v. Pasheller* (1) it was decided, where two partners were originally principal debtors to a creditor, and the partnership was dissolved and one partner went out, and the other, having taken in a new partner, continued the business, and both gave an indemnity to the partner who went out, that in such case the one who went out became only secondarily liable, or, in other words, a surety to both the continuing and the new partner.

This decides one point taken by *Mr. Finlay*, for the defendants, against him, for he argued that the plaintiff in that case never became a surety at all. It also, in my judgment, decided that, in the circumstances of that case, the old partner, Sherard (it was, in reality, the executors of the old partner; but this is immaterial), had become surety to Sir Charles Oakeley, who had advanced money to the old firm, and that Sir Charles, by giving time as regards the old debt to the principal debtors in the new firm, discharged him.

But what were the circumstances of that case?

In my judgment it is impossible to read the prolix statement of facts set out in the reports of that case, without seeing that there existed ample evidence from which to hold that Sir Charles Oakeley not only had notice of, but actually agreed to the whole arrangement which was come to by his two sons-in-law, Reid and Kynaston—viz. the substitution of Kynaston for Sherard as principal debtor with Reid, to Sir Charles for the old debt, and the constituting the old partner, Sherard, a surety for Reid and Kynaston to Sir Charles Oakeley. The taking in of the new partner, Kynaston, was good consideration for such agreement. It seems to me immaterial whether it is called an "agreement" or, as are the words used in the case, an "acceptance" or an "adoption" or an "assent" by Sir Charles, if there was good consideration for his agreeing to what had been arranged by the principal debtors between themselves. Towards the end of the argument of

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the case in the House of Lords (p. 232 in Clark and Finnely) Lord LYNTHURST is reported to have put the point. He says: "Can you cite any authority to the effect that two original principal debtors could, by arrangement among themselves, convert one into a surety only for the other principal?" In the report of *Oakeley v. Pasheller*, in Bligh, Lord LYNTHURST's question is reported thus:—

"How will an arrangement between debtors affect a creditor unless he adopts it? Can parties alter their situation with respect to the creditor without his assent? Can you cite any authority to show that joint debtors by their own act can alter their situation after the contract has been concluded?"

What was said in answer to Lord LYNTHURST, as appears from Clark and Finnely, was this. "The letters and accounts and all the circumstances of this case make it quite clear that Sir Charles Oakeley 'accepted' Reid and Kynaston as principal debtors, looking to Sherard's executors as sureties."

It appears to me, from the question, that Lord LYNTHURST did not at the time consider the mere notice of the arrangement come to by the partners *inter se* would bind Sir Charles. The words he apparently used were "adopt" and "assent."

Mr. Pemberton, so far as the report goes, appears to have satisfied Lord LYNTHURST by the answer he gave, that Sir Charles Oakeley either "adopted" or "accepted" or "assented" to the new position, for shortly after these remarks Lord LYNTHURST, finding that a new partner had been introduced, delivered a short judgment, holding that Sherard's executors had been discharged under the circumstances which existed in that case.

That there was good consideration for this to Sir Charles Oakeley, as I have before said, is clear; viz. the liability of the new partner, Kynaston. With all deference to those who have thought and still think that this judgment decides the point it is said to do, I cannot bring myself to so hold.

What in my judgment it does decide is, that where two have contracted with a creditor as principal debtors, who were then principal debtors *inter se*, and afterwards by agreement for consideration between themselves and their creditor, one of the principal debtors is to be a surety, and the other principal debtor,

then the creditor, must treat them as in that position, though he has a contract with them as principals, and cannot afterwards give time to the principal debtor without discharging the surety.

It will be noticed that in the case of *Overend, Gurney & Co. v. Oriental Financial Corporation* (4), the House of Lords was dealing with a case in which the parties contracting with the creditor were originally principal debtor and surety *inter se*; they had not to consider, and as it appears to me they did not consider, the point as to what would be the case if the two had been originally principal debtors *inter se*. And as before stated, the equity which was then applied was, that the Court would give effect to the true position of the principal debtors *inter se* when the contract was made, even though the creditors did not have notice of this position till after it was made. It is true that Lord CAIRNS, in delivering judgment in this case, did use words which would lead to the conclusion that he thought that the equity now contended for existed, for he said: "It is impossible to contend that if, after a right of action accrues to a creditor against two or more persons, he is informed that one of them is surety only and after that he gives time to the principal debtor without the consent and knowledge of the surety, that under these circumstances the rule as to the discharge of the surety does not apply." These remarks, it must be remembered, were made by Lord CAIRNS when he was dealing with a case in which the persons contracting with the creditor were always from the first in the position of principal and surety *inter se*, and not of two original principal debtors.

It is also true that in 1868 Lord HATHERLEY, when Vice-Chancellor PAGE-WOOD, in *Oakford v. European Steam Shipping Company* (9), when he was dealing with a case in which the debtors were originally principal debtors *inter se*, said of *Oakeley v. Pasheller* (1) as follows:—

"In order to sustain the plaintiff's contention, it would be necessary to give a very large extension to the doctrine of *Oakeley v. Pasheller* (1). That case determined that where a creditor had two joint principal debtors and was entitled, if he found it convenient, to give time to one and to press the other, an agreement between the debtors might so affect him as to deprive him of the right. That was a strong decision, and it went upon the footing

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that the creditor, having notice of the agreement, was bound to regard it."

This language, I own, leads to the inference that the Vice-Chancellor understood that the equity now contended for by the plaintiff existed in the case of original principal debtors *inter se*. But the learned Judge gave no reasons for its application, excepting that it had been so decided in *Oakeley v. Pasheller* (1).

The Irish case of *Maingay v. Lewis* (3), in the Court below and on appeal, exemplifies what different views can be taken of what was decided by the House of Lords in *Oakeley v. Pasheller* (1). In the present case there is no evidence, nor is it suggested, that the bank agreed to treat or "adopt" or "accepted" or "assented" to the plaintiff becoming surety; all that is alleged is that it had notice that the plaintiff had left the firm, and that the old partners had given him the indemnity which they did.

It appears to me that there is no authority actually binding upon me which would compel me to hold that equity now contended for by the plaintiff existed in a case like the present; and, if I were forced to decide the point, I should have held, as was held in *Swire v. Redman* (2), that there was no such equity. It is not, however, necessary for me to decide this question, for I am of opinion, for the reasons given at length by Lord Justice LINDLEY, that, by contract between the plaintiff and his partners contained in the deed of dissolution, this case is not governed by *Oakeley v. Pasheller* (1), nor by the equity which the plaintiff contends for, even if it exists, and that consequently he is not released from the debt of 34,000*l.* due from him to the defendants by reason of their having given time, as they did, to the new firm by a binding contract.

For these reasons, in my opinion, this appeal should be allowed and judgment entered for the defendants, with costs here and below.

Appeal allowed (34).

Solicitors : *Patersons, Snow, Bloxam & Kinder*, agents for *Gardiner & Jeffery*, Bradford, for the Appellants.

Field, Roscoe & Co., agents for *Taylor, Jeffery & Jessop*, Bradford, for the Respondent.

(34) This decision was affirmed on appeal to the House of Lords. See 6 R. 349.

HARBIN v. MASTERMAN.

1894, February 26, 27, March 5. LINDLEY, KAY, AND

A. L. SMITH, L.JJ.

Will—Trust for Accumulation—Validity—Thellusson Act (39 & 40 Geo. 3, c. 98).

A testator bequeathed his residuary personal estate upon trust to pay certain annuities out of the yearly income thereof. The surplus income of any year was given to charities, but with a direction that the same should be accumulated until the death of the last of the annuitants, whereupon such accumulations and the capital of the residuary personalty was to be divided equally among the charities. The annuitants had no claim to have any deficiencies of their annuities in any year made good out of the accumulations of previous years:—

Held, that as the annuitants could not have recourse to the accumulations which had been directed solely for the benefit of the residuary legatees, i.e., the charities, the trust for accumulation was inoperative, and the charities were entitled to the surplus yearly income as it arose.

This was an appeal from a decision of Stirling, J.

John Francis Duncan died on 1 January, 1865, and by his will, dated 15 February, 1860, gave his residuary personal estate to his executors on trust to pay certain annuities out of the annual income. The will provided for an abatement among the annuitants in case the income should in any year prove insufficient, and it contained a direction that the trustees in every year after the testator's death should invest any surplus income in certain securities, "and from and after the decease of the survivor of the said annuitants do and shall sell, dispose of, and convert into money all such part of the said trust moneys, stocks, funds, and securities, and the accumulations thereof respectively, as shall not actually consist of cash, and stand possessed of the money to arise from such sale, disposition, and conversion, and also of such part of the said trust moneys, stocks, funds and securities, and the accumulations thereof respectively as shall consist of actual cash, in trust, to pay and divide the same into the several public charities hereinafter named, according to the amount set after their respective names." Then followed the names of five charities, with the sum of 100*l.* set after each name.

In an administration suit instituted in 1865 Vice-Chancellor WICKENS held (1) that the five charities were entitled equally

(1) L. R. 12 Eq. 559; 40 L. J. Ch. 760; 19 W. R. 1053.

to the whole of the pure personalty and the accumulations during the period of twenty-one years from the death of the testator.

On 28 November, 1893, a petition presented by Mary D. Wharton and Elizabeth Warwick, who had been found to be the next-of-kin of the testator, was heard by Mr. Justice STIRLING, the questions being, (i.) whether the petitioners, as next-of-kin, were entitled to the accumulations of income since the expiration of the period of twenty-one years from the testator's death, (ii.) whether in such case they could claim immediate payment of such accumulations. Mr. Justice STIRLING having held that the charities were entitled to all the accumulations, the petitioners appealed from his decision, and, by leave, also from the decision of Vice-Chancellor WICKENS, they not having been parties to the proceedings before the latter. The Court of Appeal, having upheld the decision of Vice-Chancellor WICKENS, now heard the appeal from Mr. Justice STIRLING.

Crackanthorpe, Q.C., and Hopkinson, Q.C. (Theodore Ribton with them), for Mary D. Wharton :

The residuary gift is not effective to dispose of the accumulations of yearly income after the period of twenty-one years from testator's death until the death of the survivor of the annuitants. They therefore belong to the next-of-kin: *Talbot v. Jevors* (2), *Weatherall v. Thornburgh* (3), *Jones v. Maggs* (4), *Elborne v. Goode* (5), *Green v. Gascoigne* (6). The case of *Saunders v. Vautier* (7) does not apply, as we claim *dehors* the will.

They referred also to *Josselyn v. Josselyn* (8), *Rocke v. Rocke* (9), *Gosling v. Gosling* (10), *In re Wrey* (11), as showing the interpretation put on the Thellusson Act.

Graham Hastings, Q.C. (B. F. C. Costelloe with him), for

- (2) L. R. 20 Eq. 255; 44 L. J. Ch. 646; 23 W. R. 741.
- (3) 8 Ch. D. 261; 47 L. J. Ch. 658; 39 L. T. 9; 26 W. R. 593.
- (4) 9 Hare, 605; 22 L. J. Ch. 90.
- (5) 14 Sim. 165; 13 L. J. Ch. 394.
- (6) 4 De G. J. & S. 565; 34 L. J. Ch. 268; 12 L. T. 35; 13 W. R. 371.
- (7) Cr. & Ph. 240; 10 L. J. Ch. 354.
- (8) 9 Sim. 63.
- (9) 9 Beav. 66.
- (10) Johns. 265.
- (11) 30 Ch. D. 507; 54 L. J. Ch. 1098; 53 L. T. 334.

Elizabeth Warwick, adopted the foregoing arguments, and referred to *Oddie v. Brown* (12) and *Eyre v. Marsden* (18).

Cozens-Hardy, Q.C. (*S. Dickinson* with him), for the London Orphan Asylum, one of the charities :

The charities are entitled to the surpluses of annual income freed from any trust to accumulate. This trust is inoperative. *Saunders v. Vautier* (7) governs this case.

Buckley, Q.C. (*Bateman Napier* with him) for the National Hospital for the Paralyzed and Epileptic, another of the charities :

The annuitants have under no circumstances any right to resort to the accumulations, which are given to the residuary legatees, that is, to the charities, whose legacies are accelerated, and are payable at the end of the twenty-one years.

Haldane, Q.C., and *Hadley*, for King's College Hospital and The Public Dispensary, Carey Street; *Haldane, Q.C.*, and *H. Fellows*, for the Royal Free Hospital.

Crackanthorpe, Q.C., in reply, referred to *Bective v. Hodgson* (14), *In re Parry* (15).

Cur. adv. vult.

March 5.

LINDLEY, L.J.: This is an appeal from a decision of Mr. Justice STIRLING, and it turns upon the provisions of a will, which I will read. [His Lordship having read them, continued:] The testator died many years ago and the case has been before Vice-Chancellor WICKENS (1). He decided that the residuary legatees took the residue in equal shares, and we have already stated that upon that point in our opinion he was correct.

The effect of this will is as follows: (i.) the residue is given absolutely to the five charities in equal shares; (ii.) the residue is not to be paid to them until all the annuities have come to an end; (iii.) the annuities are all charged on the income of the trust estate, and are to be paid annually out of the annual income of that

(12) 4 De G. & J. 179; 28 L. J. Ch. 542.

(13) 2 Keen, 564; 7 L. J. Ch. 220; affirmed 4 Myl. & C. 231.

(14) 10 H. L. C. 656; 10 L. T. 202; 12 W. R. 625.

(15) 60 D. T. 489.

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estate; (iv.) the surplus, if any, of such income in any year is given to the charities absolutely; (v.) such surplus is to be accumulated until all the annuities have come to an end, and the accumulations are then to be divided between the charities, but the annuitants have no claim to the accumulations, and have no right to have any deficiencies in any year paid out of the accumulations arising from the surpluses of previous years; (vi.) the accumulations are directed to be made for a period which might exceed, and which has, in fact, exceeded, twenty-one years from the testator's death.

Now the question is, who is entitled to the accumulations which have been made already since the expiration of the period, and which may be made in future until all the annuities cease? The next-of-kin claim the accumulations under the Thellusson Act. The charities claim them on the ground that they, being the only persons entitled to the annual surpluses as they arise, were and are entitled to have them paid over to them every year, and that the trust for accumulation is invalid and may be disregarded. Mr. Justice STIRLING has decided in favour of the charities, and I am of opinion that he is right.

I will first consider the claim of the next-of-kin. The Thellusson Act, reading it shortly, runs thus: It recites that it was expedient that all dispositions of real or personal estate, whereby the profits and produce thereof were directed to be accumulated, and the beneficial enjoyment thereof postponed should be made subject to the restrictions thereafter contained. Then it enacted that no person should settle or dispose of any real or personal property in such a manner that the rents, issues, profits, or produce thereof should be wholly or partially accumulated for certain periods, one of which is the term of twenty-one years from the death of any such grantor, settlor, or testator. Then, passing over other portions of the Act which are immaterial, it goes on thus: "And in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits and produce of such property so directed to be accumulated shall, so long as the same shall be directed to be accumulated contrary to the provisions of this Act, go to and be received by such person or persons as would have been entitled thereto if such accumulations had not been directed."

The accumulations prohibited are accumulations of income by which the beneficial enjoyment thereof is postponed and the funds accumulated contrary to the provisions of this Act are to go to the persons who would have been entitled thereto if the accumulations had not been directed. Who, then, would take the surplus if the accumulations in this case had not been directed? If the charities, then they are entitled to the accumulations. The Thellusson Act itself gives it them. Again, if the trust to accumulate is invalid apart from the Act, and can be properly disregarded, the direction to accumulate the annual surpluses does not postpone the beneficial enjoyment of them, and the Act has no application to the case.

Now, notwithstanding the general principle that a donee or legatee can only take what is given him on the terms on which it is given, yet by our law there is a remarkable exception to this general principle. Conditions which are repugnant to the estate to which they are annexed are absolutely void, and may consequently be disregarded. This doctrine, I apprehend, underlies the rule laid down in *Saunders v. Vautier* (7), and enunciated with great clearness by Vice-Chancellor Wood in *Gosling v. Gosling* (10). Vice-Chancellor Wood says this: "The principle of this Court has always been to recognise the right of all persons who attain the age of twenty-one to enter upon the absolute use and enjoyment of the property given to them by a will, notwithstanding any directions by the testator to the effect that they are not to enjoy it until a later age, unless, during the interval, the property is given for the benefit of another. If the property is once theirs, it is useless for the testator to attempt to impose any fetter upon their enjoyment of it in full so soon as they attain twenty-one. And upon that principle, unless there is in the will, or in some codicil to it, a clear indication of an intention on the part of the testator, not only that his devisees are not to have the enjoyment of the property he has devised to them until they attain twenty-five, but that some other person is to have that enjoyment, or unless the property is so clearly taken away from the devisees up to the time of their attaining twenty-five as to induce the Court to hold that, as to the previous rents and profits, there has been an intestacy, the Court does not hesitate to strike out of the will any direction that the devisees shall not enjoy it in full until they attain the age of twenty-five years."

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Now applying this doctrine to the present case, the charities are not entitled to the capital of the trust estate before the annuities cease, because the annuitants are interested in the income of such capital, and that income is not the sole and exclusive property of the charities. Nor would the charities be entitled to the annual surpluses which there might be, before all the annuities ceased if in any event the annuitants could have recourse to them. But inasmuch as the terms of the will preclude any such recourse, and the accumulations are directed to be made for the benefit of the charities, and for their benefit only, it follows that each yearly surplus as it arises is their absolute property and that the direction to accumulate is invalid, and may properly be disregarded not only after but during the period of twenty-one years from the death of the testator. This certainly will be so if the charities can be regarded as ordinary individuals not under any personal disability. Vice-Chancellor WICKENS (before whom the case came in 1871 upon the construction of the will, but who did not then decide who was entitled to the accumulations) evidently was of this opinion; but he had some doubts about the propriety of so regarding them. As regards that charity which is a corporation, there is, in my opinion, no legal ground for this doubt. As regards the other charities, there is more room for hesitation. But here again, their trustees are, in my opinion, absolutely entitled to the annual surpluses as against the testator's executors, and the trustees of his will, and the annuitants who are his legatees. On this point I agree with Mr. Justice STIRLING, and I do not regard Vice-Chancellor WICKENS as dissenting or doing more than expressing a doubt, and leaving the point open for decision.

The fact that accumulations have been made since the expiration of twenty-one years from the testator's death will not avail the next-of-kin. If the surplus income accumulated was the property of the charities, the unnecessary accumulation of that surplus cannot deprive them of their right to it.

The above view of the construction of the testator's will and of the law applicable to it renders it unnecessary to comment on *Weatherall v. Thornburgh* (3) and *Talbot v. Jevers* (2) except by observing that the directions to accumulate in those cases were

only invalidated by the Thellusson Act itself, which is not the case here. The appeal must therefore be dismissed.

KAY, L.J.: I entirely agree. It seems to me that the case may be shortly stated in this way; the direction to accumulate in this will is altogether futile. The charities have a right to say: "We are entitled to the income; no one else has, or can have, any interest in it; we do not desire to have it accumulated. We prefer to receive the surplus income as it arises." That right of theirs prevents any accumulation being made, and therefore the Thellusson Act does not apply to the case. It is not within the mischief that the Act was intended to obviate, which was that an accumulation should not go on for more than the period specified by the Act so as to take the income away from everybody during the time of that accumulation. Here the right of the charities is to prevent the income from being taken away from them at all. They have a right to receive it just as it arises.

I come to that conclusion because having studied the will very carefully, I think the effect of it is this: The annuities are to be paid out of the annual income of this residuary fund, and the provision that they are to abate when that annual income is not enough to satisfy them shows that the annuitants have no claim whatever for an arrear of one year upon any income that was received in previous years. Therefore the surplus income of each year which is directed to be accumulated is a surplus income upon which the annuitants could have no kind of claim. No one else can assert any claim upon it, and, seeing that the fund is given as residue to the charities including these accumulations, the charities take a present vested interest in that residue, and if no accumulations whatever had been directed, and whether any accumulations are directed or not, all the surplus income of that residue after satisfying the annuities year by year belongs as a present vested interest to the charities.

I will try the case again in this way: Suppose there had been no gift to the charities at all except of this surplus income, and that the surplus income had been given to the charities, and then that there was a direction to accumulate the surplus income until the death of the last annuitant, and then to pay it to the charities, the

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charities would have the same right that the legatee had in *Saunders v. Vautier* (7) to come and say, "We do not desire any accumulation of that to be made: it is given absolutely to us, and therefore we say we would rather take it at once, and the postponement of payment not being for any purpose of the estate, not being for the benefit of the annuitants or any one else at all, we say we would rather not let it accumulate; we will take the income from year to year as it arises."

Now does it make any difference that besides the surplus income the capital from which that surplus income is to be derived is also given to the charities, and that as to the capital they cannot take that until the death of the last annuitant? I do not see why it should. It is quite plain that as to the capital they have no right to receive that until the death of the last annuitant. But then there is a reason for that, because the capital was meant to secure all these annuities, and the testator did not choose to give the capital over to the charities until the last of these annuities was satisfied. He has dealt as I pointed out, otherwise with the surplus income in which the annuitants have no interest whatever. Therefore for the reasons I have given, because it seems to me that this surplus income was vested in the charities from the death of the testator, and that no one else has the least interest in or claim upon it, the charities have a right to say that the direction for accumulation was altogether a futile thing; that they would rather receive the income at once and treat the direction for accumulation as a matter which they have a right to disregard. That seems to me to come entirely within the principle of *Saunders v. Vautier* (7), and accordingly I think that the learned Judge in the Court below was right, and that this appeal must be dismissed.

A. L. SMITH, L.J. : I agree, and have nothing to add.

Appeal dismissed.

Solicitors : *Hood Barrs & Co.*, for the Appellants.

Winter & Co.; *Gadsden & Treherne*; *Hyde, Tandy, Mahon, & Sayer*; *Bower, Cotton & Bower*, for the Respondents.

IN RE HEAD, HEAD v. HEAD.

1894, April 5. LINDLEY, LOPES AND KAY, L.JJ.

Partnership—Novation—Banker and Customer—Transfer from Current to Deposit Account—Deceased Partner's Estate.

The transfer of a sum of money after the death of a partner in a bank from a current to a deposit account is a novation so as to discharge the estate of the deceased partner from liability to the customer.

APPEAL from a decision of Chitty, J.

George Head and Searle Head carried on business in partnership as bankers at East Grinstead, in Sussex.

George Head died on 10 December, 1890, and the surviving partner continued to carry on the business under the style of the old firm, but stopped payment on 24 February, 1892, and was adjudicated a bankrupt in the following May.

Alfred Tester had been a customer of the bank since 1883 to the time of stopping payment, and at the death of George Head had a balance of 501*l.* 11*s.* 6*d.* to the credit of a current account at the bank. Between the death of George Head and 24 December, 1890, he drew upon this balance to the amount of 22*l.* 8*s.*, and paid in sums amounting to 122*l.* 10*s.* Being anxious to obtain interest for the money he had in the bank, he called and saw Searle Head, who told him not to draw the money out, but that while it remained there he would receive 3½ per cent. on it. Accordingly on 24 December he transferred 500*l.* from the current account to a deposit account, receiving a deposit receipt stating that "the deposit receipt bears interest at 3½ per cent. per annum if left undisturbed for six months," and that it "is repayable only after twenty-one days' notice."

Between the death of George Head and the stoppage of the bank, Tester paid in various sums to his current account, and drew out sums amounting to more than the balance existing at the death without taking into account the 500*l.* transferred to deposit.

At the date of the stoppage of payment by the bank on 24 February, 1892, his current account was overdrawn to the amount of 31*l.* 0*s.* 10*d.* The 500*l.* was still on deposit.

An application was made on his behalf in the administration of

the estate of George Head, in which he sought to prove against the estate as a partnership creditor for the sum of 479*l.* 3*s.* 6*d.*, being the balance existing on the current account at the death of George Head less 22*l.* 8*s.* drawn out between the death and 24 December, 1890.

On 30 January, 1894, CHITTY, J., disallowed the claim, and made an order accordingly.

The claimant appealed.

Swinfen Eady, Q.C., and *Eve*, for the appellant :

The estate of the deceased partner has not been released from the debt. There has been no novation by the deposit. The deposit account debt is really the same as the current account debt, with a difference of the conditions of payment. The estate is liable : *In re Head, Head v. Head* (1), *Harris v. Farwell* (2), *Heath v. Percival* (3).

R. F. Norton and *Ernest Hatton, contra*, for George Head's executrix, were not called upon to argue.

LINDLEY, L.J. : I do not think there is any doubt about this case. The customer goes to the surviving partner in the bank and says he will draw out his current account or some of it. The banker says, "Don't do that, but leave it on deposit." And the customer agrees to that suggestion. It seems to me the case is the same as if the customer drew a cheque for the amount, and drew it out of his current account and put it in afresh on a deposit account, the money being paid and then lent on a totally different contract from that which existed in regard to the current account. It is not like the cases which have been cited. When the money became on deposit, the course of dealing with it was changed. I think it would be unfair to charge the estate of the deceased partner. I am of opinion that Mr. Justice CHITTY was right, and the appeal must be dismissed.

LOPES, L.J. : It seems to me this case is the same as if the

(1) 3 R. 712; [1893] 3 Ch. 426; 63 L. J. Ch. 35; 69 L. T. 753; 42 W. R. 55.

(2) 15 Beav. 31; 15 L. J. Ch. 185.

(3) 1 P. Wms. 682.

customer had drawn a cheque for the 500*l.*, received the money across the counter, put it in his pocket, gone to the other side of the bank where the deposit accounts were kept and opened a deposit account, depositing the money. The treatment of the current account is different altogether from that of the deposit account; while the money was on a current account, it had to be paid on the presentation of a cheque and it carried no interest; when it became on deposit, it was no longer payable to a cheque, but it was only payable after notice of twenty-one days. There was, in effect, payment out from the current account when the customer gave notice for the money to be on deposit, and a new contract was then entered into. The appeal, I think, therefore fails.

KAY, L.J.: The customer intimated to the surviving partner a desire to draw out the 500*l.*, but was induced by him to leave it on deposit instead, and a deposit receipt was given him. The current account was continued, and the drawings therefrom have exceeded the amount placed on deposit, so that if that sum had been left in the current account it would long ago have been swallowed up and the debt discharged. Then when the surviving partner becomes bankrupt the customer says: "I will charge the estate of the deceased partner." As I said, if the money had been left in the current account, it would have been discharged long ago. In my opinion, by its being taken out of the current account, and allowed to go on deposit, the old liability in respect of it is completely discharged, and the old liability of the deceased partner of course discharged. The whole transaction constituted a new contract with the surviving partner just as if the money had been taken out and lent to him on his promissory note.

Appeal dismissed.

Solicitors: *Hasties*, for *Hasties, Little & Hughes*, East Grinstead,
for the Appellant.

Clarke & Calkin, for the Respondent.

VERNER v. GENERAL AND COMMERCIAL INVESTMENT TRUST (LIMITED).

1894, *March* 14, 15, 16, 20; *April* 7. LINDLEY, KAY AND

A. L. SMITH, L.JJ.

Company—Capital—Depreciation—Payment of Dividend.

In the absence of some special article or contract to the contrary, a limited company which has lost part of its fixed capital by depreciation can lawfully declare or pay a dividend without first making good the capital which has been lost.

APPEAL from a decision of Stirling, J.

The defendant company was incorporated as a company limited by shares on 26 January, 1888, by registration of a memorandum and articles of association. Of its authorized capital 60,000 shares of 10*l.* each had been issued and fully paid up, and converted into stock of two classes, preferred and deferred. The company had also issued 300,000*l.* perpetual debenture stock, bearing interest at 4 per cent., and secured by a floating charge on all the assets of the company.

The objects for which the company was established were defined in the memorandum of association to be, *inter alia*, “III. (a) to raise money by share capital and invest the amount thereof in or otherwise acquire and hold any of the following investments (that is to say),” then a list was given: “(b) to borrow or raise money by the issue or sale of any bonds, mortgages, debentures, or debenture stock, or in any manner, and to invest the money so obtained in any such investments as aforesaid;” “(i.) To receive dividends, income, profits, bonuses, and advantages of every description from time to time payable or receivable in respect of the company’s investments, and to apply the same respectively according to the provisions of the articles of association in force for the time being.”

The articles of association provided: “(84) Subject to the rights of members holding share capital issued upon special conditions, the receipts of the company from the dividends, income, profits, bonuses, and advantages payable or receivable in respect of the company’s investments shall be applicable as follows: first, to the payment of a dividend for the particular year at the rate of 5 per

cent. per annum on the preferred stock ; second, to the payment of such a dividend on the deferred stock as the same shall suffice to pay, and the trustees may, with the sanction of the company in general meeting, declare a dividend to be paid to the members accordingly ; (85) the trustees may, before recommending any dividend, set aside out of the profits of the company such sum as they think proper as a reserve fund to meet contingencies, or for equalizing dividends, or for any other purpose of the company, and may from time to time apply the whole or any part of such fund for any purposes of the company."

Some of the investments held by the company had largely depreciated in value. Of such depreciation, 75,000*l.*, or thereabouts, represented the amount which there was no reasonable prospect of recovering within any reasonable period, and had to be regarded as absolutely lost. A further large sum represented what might be only a temporary depreciation.

The company's receipts for the past year in respect of income exceeded the expenditure by some 23,000*l.*

Upon motion by the plaintiff, who commenced the action on behalf of himself and all other stockholders of the company other than the defendant directors, that the defendants might be restrained until the trial of the action or further order from declaring and from distributing among the members of the company any dividend under the circumstances above stated, Mr. Justice STIRLING, on 6 March, 1894, held, having regard to the peculiar nature of the constitution of the company, that it had not been made out that it was beyond the power of the company to pay a dividend without replacing the lost capital, though if, for instance, the object of the company had been to carry on a stockbroking business, and the investments had been ordinary stock-in-trade, his decision might have been different.

The plaintiff appealed.

Graham Hastings, Q.C., and Kirby, for the appellant :

The company cannot pay a dividend without first replacing the lost capital.

They referred to *Mills v. Northern Railway of Buenos Ayres* (1),

(1) L. R. 5 Ch. 621 ; 23 L. T. 719 ; 19 W. R. 171.

Lee v. Neuchatel Asphalte Co. (2), and *In re Ebbw Vale Steel, Iron and Coal Co.* (3).

Buckley, Q.C., and *Eve*, for the respondents :

There is nothing to prevent the company paying a dividend out of the year's excess of receipts over expenditure ; they may divide the revenue without replacing the lost capital. The capital and the revenue accounts are two different things, as the authorities show : *Mills v. Northern Railway of Buenos Ayres* (1). There is nothing either in the general law or in the constitution of this particular company to justify the Court to interfere.

They also referred to *Lee v. Neuchatel Asphalte Co.* (2), *Dent v. London Tramways Co.* (4), *In re Ebbw Vale Steel, Iron and Coal Co.* (3), *Bolton v. Natal Land and Colonization Co.* (5), and *Lubbock v. British Bank of South America* (6).

Kirby, in reply :

The question at issue is not covered actually by authority, but so far as the cases touch it they are in the appellant's favour.

You cannot have profits and loss co-existing in the same year, but you must look at the position of the company's finances as a whole ; there is therefore nothing out of which to pay any dividend. *Lubbock v. British Bank of South America* (6), seems entirely in my favour. The scheme of trading of the company is that profits shall counterbalance the risk of loss ; in other words, that profits shall replace capital. Profits out of which to pay a dividend must be profits on all the transactions of the year.

Cur. adv. vult.

March 20.

The case coming on for judgment, Lord Justice LINDLEY said the Court had hoped to be able to give a considered judgment, but they not having had sufficient time to prepare one, and the case being of importance, they would now state that they agreed with the decision

(2) 41 Ch. D. 1 ; 58 L. J. Ch. 408 ; 61 L. T. 11 ; 37 W. R. 321.

(3) 4 Ch. D. 827 ; 46 L. J. Ch. 241 ; 36 L. T. 308.

(4) 16 Ch. D. 344 ; 50 L. J. Ch. 190 ; 44 L. T. 91.

(5) [1892] 2 Ch. 124 ; 61 L. J. Ch. 281 ; 65 L. T. 786.

(6) [1892] 2 Ch. 198 ; 61 L. J. Ch. 498 ; 67 L. T. 74.

of Mr. Justice STIRLING, and proposed to give their reasons at length at a later date.

April 7.

LINDLEY, L.J. [delivering the judgment of himself and A. L. SMITH, L.J., said:] The broad question raised by this appeal is, whether a limited company which has lost part of its capital can lawfully declare or pay a dividend without first making good the capital which has been lost. I have no doubt it can—that is to say, there is no law which prevents it in all cases and under all circumstances. Such a proceeding may sometimes be very imprudent, but a proceeding may be perfectly legal and may yet be opposed to sound commercial principles. We, however, have only to consider the legality or illegality of what is complained of.

As was pointed out in *Lee v. Neuchatel Asphalte Co.* (2), there are certain provisions in the Companies Acts relating to the capital of limited companies, but no provisions whatever as to the payment of dividends or the division of profits. Each company is left to make its own regulations as to such payment or division. The statutes do not even expressly and in plain language prohibit a payment of dividend out of capital. But the provisions as to capital, when carefully studied, are wholly inconsistent with the return of capital to the shareholders, whether in the shape of dividends or otherwise, except, of course, on a winding-up, and there can, in my opinion, be no doubt that even if a memorandum of association contained a provision for paying dividends out of capital, such provision would be invalid. The fact is, that the main condition of limited liability is that the capital of a limited company shall be applied for the purposes for which the company is formed, and that to return the capital to the shareholders either in the shape of dividend or otherwise is not such a purpose as the Legislature contemplated. But there is a vast difference between paying dividends out of capital and paying dividends out of other money belonging to the company, and which is not part of the capital mentioned in the company's memorandum of association. The capital of a company is intended for use in some trade or business, and is necessarily exposed to risk of loss. As explained in *Lee v. Neuchatel Asphalte Co.* (2), the capital even of a limited company is not a debt owing by it to its shareholders, and if the capital is lost the company is under no legal

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obligation either to make it good or, on that ground only, to wind up its affairs. If, therefore, the company has any assets which are not its capital within the meaning of the Companies Acts, there is no law which prohibits the division of such assets amongst the shareholders.

Further, it was decided in that case, and, in my opinion, rightly decided, that a limited company formed to purchase and work a wasting property, such as a leasehold quarry, might lawfully declare and pay dividends out of the money produced by working such wasting property without setting aside part of that money to keep the capital up to its original amount. There is no law which prevents a company from sinking its capital in the purchase or production of a money-making property or undertaking, and in dividing the money annually yielded by it without preserving the capital sunk so as to be able to reproduce it intact either before or after the winding up of the company. A company may be formed upon the principle that no dividends shall be declared unless the capital is kept undiminished, or a company may contract with its creditors to keep its capital or assets up to a given value. But in the absence of some special article or contract there is no law to this effect, and, in my opinion, for very good reasons. It would, in my judgment, be most inexpedient to lay down a hard-and-fast rule which would prevent a flourishing company, either not in debt or well able to pay its debts, from paying dividends, so long as its capital sunk in creating the business was not represented by assets which would, if sold, reproduce in money the capital sunk. Even a sinking fund to replace lost capital by degrees is not required by law. It is obvious that dividends cannot be paid out of capital which is lost; they can only be paid out of money which exists and can be divided. Moreover, when it is said, and said truly, that dividends are not to be paid out of capital, the word "capital" means the money subscribed pursuant to the memorandum of association, or what is represented by that money. Accretions to that capital may be realized and turned into money, which may be divided amongst the shareholders, as was decided in *Lubbock v. British Bank of South America* (6).

But although there is nothing in the statutes requiring even a limited company to keep up its capital, and there is no prohibition

against payment of dividends out of any other of the company's assets, it does not follow that dividends may be lawfully paid out of other assets regardless of the debts and liabilities of the company. A dividend presupposes a profit in some shape, and to divide as dividend the receipts, say, for a year, without deducting the expenses incurred in that year in producing the receipts, would be as unjustifiable in point of law as it would be reckless and blameworthy in the eyes of business men. The same observation applies to payment of dividends out of borrowed money. Further, if the income of any year arises from a consumption in that year of what may be called circulating capital, the division of such income as dividend without replacing the capital consumed in producing it will be a payment of a dividend out of capital within the meaning of the prohibition which I have endeavoured to explain. It has been already said that dividends presuppose profits of some sort, and this is unquestionably true. But the word "profits" is by no means free from ambiguity. The law is much more accurately expressed by saying that dividends cannot be paid out of capital than by saying that they can only be paid out of profits. The last expression leads to the inference that the capital must always be kept up and be represented by assets which, if sold, would produce it; and this is more than is required by law. Perhaps the shortest way of expressing the distinction which I am endeavouring to explain is to say that fixed capital may be sunk and lost, and yet that the excess of current receipts over current payments may be divided, but that floating or circulating capital must be kept up, as otherwise it will enter into and form part of such excess, in which case to divide such excess without deducting the capital which forms part of it will be contrary to law.

The Companies Acts do not require even limited companies to keep accounts, still less to keep them in any particular form. The only enactment on the subject is section 26 of the Companies Act, 1862, and Form D in the third schedule, and these relate solely to the nominal capital and calls. But, although this is so, yet, as a matter of business, accounts of some sort must be kept; and in order to show what has been subscribed by the shareholders, and what has become of the money so subscribed, and to show the results of the company's trading or business, it is practically necessary to

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keep a capital account and what is called a "profit and loss account," and, as a matter of business, these accounts ought to be kept as business men usually keep them. Accordingly, we find provisions for keeping such accounts in Table A in the appendix to the Companies Act, 1862 (see articles 78-82), and in the articles of association of most, if not all, companies. But there is no law which compels limited companies in all cases to recoup losses shown by the capital account out of the receipts shown in the profit and loss account, although care must be taken not to treat capital as if it were profit. This is in accordance with *Bolton v. Natal Land Co.* (5), which is the latest reported case on the subject. Further, it is obvious that capital lost must not appear in the accounts as still existing intact; the accounts must show the truth and not be misleading or fraudulent. The Acts of 1867 and of 1877 are in no way inconsistent with these observations. They provide for the reduction of the nominal capital mentioned in the memorandum of association. They do not render it obligatory on a company which has lost some of its capital to reduce the nominal amount mentioned in its memorandum. There are advantages in doing so, and the Acts were passed to enable limited companies to obtain these advantages, but there is nothing in these Acts, any more than in the Act of 1862, which prevents a company which has lost part of its capital from continuing to carry on business and declaring and paying dividends. A law forbidding this may well have been considered by the Legislature far too rigid, and in their desire to check dishonest and reckless trading Courts must be careful not to put tighter fetters on companies than the Legislature has authorized.

It follows from what has been said above that the proposed payment of dividend in this particular case cannot be restrained. There is nothing in the memorandum or articles of association which requires lost capital to be made good before dividends can be declared; on the contrary, they are so framed as to authorize the sinking of capital in the purchase of speculative stocks, funds, and securities, and the payment of dividends out of whatever interest, dividends, or other income such stocks, funds, and securities yield, although some of them are hopelessly bad, and the capital sunk in obtaining them is lost beyond recovery. There is no suggestion of

any improper juggling with the accounts, and there is no payment of dividend out of capital. There is no insolvency, and we have not to deal with a petition to wind up. Some capital is lost, but that is all that can be truly said, and that is not enough to justify such an injunction as is sought. The appeal must be dismissed.

KAY, L.J. : I should be sorry if it were held that a joint-stock trading company can properly estimate their profits in any way differing from that in which an individual or a partnership of individuals carrying on a similar business would do. An ordinary trader takes a yearly account of all the capital employed in his business, allows for any loss or depreciation in value, and carries the balance to the profit and loss account from which he makes out the profit and loss of the year. In this mode a loss or depreciation of such capital affects directly the profit of the year which is thereby diminished. But if upon the whole capital account there is a gain this goes to swell the year's profits.

In my opinion a joint-stock trading company should do the same. The question in this case is whether the capital employed by this company in making investments is capital employed in the business for the purpose of this usual mode of taking the year's account. If the company were formed for the purpose of buying stocks, shares, and the like, to sell again, and their business was to make profit on such resale, it is obvious that any profit or loss on such transactions must be estimated in the way I have stated. But this is not their business. They buy stocks, shares, and the like, and they have power to sell and charge them. But they buy as investments, and do not look to the sale as the source of their profit. They buy, we are told, all sorts of investments, which nominally pay a large rate of interest, those, in short, in which a prudent man would not invest his own money, and the source of their profit is that, having very large funds entrusted to them by a confiding public, they are able out of the income of these investments to pay in most years something more to their shareholders than the 3 or 4 per cent. which represents at present the utmost income that can be obtained from safe securities. The natural result of such a reckless dealing with the moneys entrusted to them has followed in this case. There has been an actual loss of invested capital to the amount of

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about 75,000*l.* If the depreciation below the cost price of other investments be added to this, the loss is much greater. This company seems to have been courting the fate which has overtaken other similar companies which are now in liquidation. The company have power by their articles to form out of income a reserve fund before declaring any dividends, and if they were to do this in order to make good the loss they have sustained the directors would be acting within their powers. So, if the capital had been increased by a rise in value of the investments, I conceive that they might have realised some part of that increase and distributed it as dividend. The question is whether they were compellable to do either of these things.

It is argued that in the events that have happened, if they do not replace the lost capital out of income they will in effect be paying dividends out of capital; that is only another mode of trying the same question. If they are not bound so to replace the lost capital they may divide the whole income among the shareholders without devoting any of it to this purpose. I have not a very confident opinion in the matter, but on the whole I am not satisfied that there is any legal obligation on the directors to do this. The persons who have been so foolish as to take shares in this company seem to me with their eyes open to have entered upon a reckless and dangerous speculation involving an almost certain loss and depreciation of capital. They seem to me to have authorized their trustees to make the investments which they have made. In the case of any ordinary trust it is not the right of any *cestui que trust*, where an authorized investment has failed, to require that it should be replaced out of the income of the remaining investments. That would be sacrificing the interest of a tenant for life to that of the remaindermen. In this company the effect would be to give the deferred shareholders a benefit out of the income of the preference shareholders. I do not think this was the intention.

[His Lordship referred to the memorandum of association, III. (i.), setting out the objects for which the company was established, and to articles 84 and 85, and proceeded:] These provisions seem to me to mean that any income received may be divided, whether part of the capital is lost or not. At present I do not know of any law to

prevent this, and it might be difficult to frame such a law without unduly interfering with the liberty of commercial proceedings. I have no sympathy whatever with those who have become shareholders in such an undertaking. The object and the effect of the operations of such companies is to give a fictitious value to speculations as unsound as their own by keeping up the market price of the stocks and shares in which it is their business to invest, and the sooner it is generally understood what the probable result of such transactions may be the better it will be for the commercial and investing classes in general.

Appeal dismissed.

Solicitors: *Ashurst, Morris, Crisp & Co. ; E. Flux, Leadbitter & Paterson.*

IN RE LUMLEY.

1894, April 11. LINDLEY, LOPES AND KAY, L.JJ.

Practice—Solicitor—Taxed Costs—Four-day Order—Sequestration—Rules of the Supreme Court, 1883, Order XLIII. r. 7.

The effect of Order XLIII. r. 7 is to alter the old Chancery common practice under which payment of costs, where no time was fixed, was enforced by subpoena, upon proof of service of which and of non-payment a writ of sequestration might issue as of course, and to substitute for the subpoena the leave of the Court or a Judge to issue a writ of sequestration, no four-day order being necessary.

APPEAL from a decision of North, J.

In June and October, 1893, three several orders were made for payment by Mary Cathcart to Hood Barrs, a solicitor, who was the assignee of Messrs. Lumley, solicitors, of three separate sums for taxed costs, such sums amounting together to 115*l.* 1*s.* 2*d.*

The orders were not obeyed, and upon the application of Hood Barrs for leave to issue a writ of sequestration, Mr. Justice NORTH, on 15 January, 1894, made an order in Chambers directing that "the respondent Mary Cathcart do pay to the said Hood Barr within four days after service of this order the sum of 115*l.* 1*s.* 2*d.*," being the aggregate amount of taxed costs directed to be paid under

the three previous orders. The order proceeded: "And in default of such payment it is ordered that the said Hood Barrs be at liberty to issue a writ of sequestration against the separate estate of the said Mary Cathcart not subject to any restriction against anticipation, unless by reason of the Married Women's Property Act, 1882, the property shall be liable to sequestration, notwithstanding such restriction. And it is ordered that it be referred to the taxing-master to tax the costs of the applicant of this application. And it is ordered that the said Mary Cathcart do within four days after service of the taxing-master's certificate pay to the applicant his said costs when taxed, and in default of such payment the applicant is to be at liberty to issue a writ of sequestration against the respondent's separate property as aforesaid for the same."

On 2 March, upon motion by Mrs. Cathcart, Mr. Justice NORTH refused to discharge the order of 15 January.

Mrs. Cathcart appealed.

The appellant in person.

Swinfen Eady, Q.C., and H. Terrell, for the respondents:

The order is in the same form as in *Snow v. Bolton* (1). A writ of sequestration can issue without the necessity of a four-day order at all.

They also referred to *Willcock v. Terrell* (2) and *Hulbert and Crowe v. Cathcart* (3).

LINDLEY, L.J.: [after reading the order of 15 January above set out, continued:] I will first say a few words as to the form of this order and then as to the merits. As to the form, I think the order is obviously wrong, and that it is not competent to any Judge to make an order giving liberty to issue a writ of sequestration or a writ of attachment upon a future uncertain event, but that he must exercise his discretion upon the facts when they are brought before his notice; and to make the order conditionally is to do what is contrary to law.

If this were the whole of the case we should set aside the order,

(1) 17 Ch. D. 433; 50 L. J. Ch. 743; 44 L. T. 571; 29 W. R. 583.

(2) 3 Ex. D. 323; 39 L. T. 84.

(3) [1894] 1 Q. B. 244; 63 L. J. Q. B. 121; 70 L. T. 558.

but it is not all. We have made inquiry, and we find, on ascertaining the facts, that what happened was this: Certain orders had been made for payment of certain costs by Mrs. Cathcart to Mr. Hood Barrs. Payment was not made and application was made for leave to issue a writ of sequestration. Upon that application Mr. Justice NORTH intended to give leave to issue a writ then and there, but as a matter of grace he gave Mrs. Cathcart the concession of four days within which to obey the order. The ordinary practice in such a case would be that the order for sequestration should not be drawn up for four days, or that it should lie in the office for' our days, but by inadvertence the order here was drawn up in the form in which it was, and the four-day order was engrafted on the order giving leave to issue the writ.

Now, had Mr. Justice NORTH jurisdiction to make an order for sequestration without a four-day order? Order XLII. r. 6, prohibits sequestration in the case of payment of money: it says, "A judgment for the recovery of any property other than land or money may be enforced: (a) by writ for delivery of the property; (b) by a writ of attachment; (c) by writ of sequestration." Then Order XLIII. r. 6, says that "where any person is by any judgment or order directed to pay money into Court or do any other act in a limited time and, after due service of such judgment or order, refuses or neglects to obey the same according to the exigency thereof, the person prosecuting such judgment or order shall, at the expiration of the time limited for the performance thereof, be entitled, without obtaining any order for that purpose, to issue a writ of sequestration against the estate and effects of such disobedient person. Such writ of sequestration shall have the same effect as a writ of sequestration in Chancery had before the commencement of the principal Act, and the proceeds of such sequestration may be dealt with in the same manner as the proceeds of writs of sequestration were before the same date dealt with by the Court of Chancery." Although, then, there may be a judgment or order for payment of money and inability to issue a writ of sequestration for it, it does not follow, from what I have read, that you cannot get a four-day order.

Now, that order which I have just read does not refer to costs. Under the old Chancery practice as to costs you could get a four-

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day order, and if that were not complied with, issue a writ of sequestration; but the more common method of enforcing payment was by subpœna, no limit of time being fixed for payment and upon proof of service of the subpœna and proof of non-payment, a writ of sequestration might issue at once. That is now altered by Order XLIII. r. 7, which says, "No subpœna for the payment of costs and, unless by leave of the Court or a Judge, no sequestration to enforce such payment shall be issued;" the effect of which is to abolish the subpœna and prevent merely going to the office and getting sequestration as a matter of course, and instead to substitute application to the Court or a Judge for leave to issue a writ. Now, putting the rules and the old practice together, I think that the practice which has prevailed since 1883 is right, and that an order for sequestration for costs can now be obtained without a four-day order, and Mr. Justice NORTH, therefore, had jurisdiction, on proof of the facts, to give leave to issue a writ of sequestration. We will not, therefore, discharge the order of 15 January, but we think it should be varied by striking out the four-day order part of it, which ought never to have been put in. We make no order as to costs, the order being wrong on the matter of form though right in substance.

LOPES, L.J.: The order which we have to deal with is one as to costs, and it is only necessary to consider Order XLIII. r. 7. Under the old practice, no time used to be fixed for payment of costs, and I think no limit of time is necessary under the new practice, but the leave of the Judge is substituted for the subpœna. In form the order of Mr. Justice NORTH is wrong, for he was making an anticipatory order which he had no power to do. But the inquiries which we have made show that what he intended to do was to make an immediate order for sequestration, and that the introduction of the four days was a matter of grace. The order, therefore, is not in proper form. Mr. Justice NORTH had jurisdiction to order a writ of sequestration to issue, and I agree that the order must be varied as Lord Justice LINDLEY has said.

KAY, L.J.: I agree.

Order varied.

Solicitors: The Appellant in person.

Hood Barrs & Co., for the Respondent.

IN RE THE TRADE-MARK OF LA SOCIÉTÉ ANONYME DES VERRERIES DE L'ÉTOILE.

1894, February 26. LINDLEY, KAY AND A. L. SMITH, L.JJ.

Trade-mark—Registration—Star—Subsequent Registration of Words, “Red Star Brand”—“Calculated to deceive”—Motion to rectify Register—“Person aggrieved”—Delay—Patents, &c. Act, 1883 (46 & 47 Vict. c. 57), ss. 67, 72, subs. 2, 90—Patents, &c. Act, 1888 (51 & 52 Vict. c. 50), ss. 11, 14.

Inasmuch as the registration of a device as a trade-mark, by section 67 of the Patents, &c. Act of 1883, gives the registered owner the exclusive right to use the same in any colour, a mere description in words of the same device, although confined to some particular colour, cannot be subsequently registered by any other person in respect of the same class of goods.

In 1876, B. & Co., who were export merchants in London, and were in the habit of purchasing glass in Belgium and shipping it from this country to the colonies, registered as a trade-mark a star in connexion with their window glass, which became known in the trade as “Star Brand” glass. In 1890 a Belgian company registered in England as a trade-mark for window glass the words “Red Star Brand,” having in 1885 registered in Belgium the device of a red star which they had ever since 1880 largely used on cases of glass sent to the United Kingdom. B. & C. having been informed in 1893 that the Belgian company’s glass was being sold in New Zealand under the description of “Red Star Brand,” learnt for the first time of the registration of the mark in question, and they thereupon moved to have it expunged from the register of trade-marks:—

Held, that B. & Co. were entitled to have the mark “Red Star Brand” expunged on the ground that it was calculated to deceive, and that they were persons aggrieved within section 90 of the Patents, &c. Act, 1883, and that there had been under the circumstances no such delay on their part in applying to the Court as would preclude them from relief.

APPEAL by La Société Anonyme des Verreries de l’Étoile from an order of Stirling, J., made on 4 November, 1893 (1), directing the above-mentioned trade-mark to be expunged from the register.

Messrs. Henry Brooks & Co., of Ethelburga House, Bishops-gate Street, and their predecessors have for many years carried on business in London as Australian merchants and exporters, and they have since 1875 dealt largely in window glass. Their ordinary course of business appears to be as follows: they purchase in Belgium glass which has been manufactured in that country, and the glass so purchased is delivered to them at Antwerp and shipped

by them to the United Kingdom, whence it is again shipped by them chiefly to Australia and New Zealand, in execution of orders received by them from persons and firms carrying on business in the colonies, and also sometimes from persons in the United Kingdom.

In February, 1876, they registered as a trade-mark, No. 2,980, the device of a star in connexion with window glass. According to the evidence, this trade-mark was in use as early at least as 1875; and their glass, to which the mark was affixed, was in that year and has ever since been frequently ordered by their customers by the designation of the "Star Brand." The Société are a Belgian company engaged in the manufacture of glass, but they have no place of business in England. Their predecessors registered in Belgium as a trade-mark for glass on 27 January, 1885, the device of a red star with the letters L.L. underneath, and on 26 October, 1892, the Société registered the same device without the letters L.L. On 20 March, 1890, the Société registered in England as a trade-mark for window glass and plate glass, not the device registered in Belgium, but simply the words "Red Star Brand," and this mark, No. 96,732, Messrs. Brooks & Co. sought to expunge. It appeared from the evidence that the Société and their predecessors had used the device registered in Belgium as a trade-mark ever since 1880, and had during the period that had since elapsed sent to the United Kingdom large quantities of glass bearing the device of a red star on the cases. It was stated by their manager, M. Lannoy, that they did not ship to Australia or the colonies. In the course of last year Messrs. Brooks & Co. were informed by an agent of theirs in New Zealand that window glass was being offered for sale there as "Red Star Brand." They thereupon made inquiries, and for the first time ascertained that those words had been registered as the Société's trade-mark. Messrs. Brooks & Co. thereupon gave notice of motion to rectify the register of trade-marks by expunging the mark. The Comptroller-General was in the first instance the only respondent, but the Société having been informed of the proceedings, applied to be made respondents and submitted to the jurisdiction. Messrs. Brooks & Co. opposed the application unless the Société gave security for costs, but STIRLING, J., decided that they were entitled to appear on the motion without giving such

security: *In re La Société Anonyme des Verreries de l'Étoile* (No. 1) (2). On the hearing of the motion,

STIRLING, J., held that the mark of the Société was "calculated to deceive," and that Messrs. Brooks & Co. were not precluded by delay from obtaining the relief which they asked, and he accordingly directed the trade-mark to be expunged from the register.

The Société appealed.

Moulton, Q.C., and Roger Wallace, for the appellants:

The trade-mark in question was registered in 1890, and the appellants have used a red star on their cases of glass for many years, and have sold annually in the United Kingdom upwards of 30,000*l.* worth of glass so marked. The registration of the words "Red Star Brand," which have become distinctively attached to their glass, has not been proved to have led to any confusion between their goods and those of the respondents, or to have injured the respondents, inasmuch as they do not trade in England. It may be that the appellants could not have registered the words "Star Brand" or "Star," but the addition of the word "Red" makes their mark sufficiently distinctive. Having regard to the circumstances that the respondents do not trade in this country, and that the appellants have such a large trade here, their mark does not so nearly resemble the respondents' mark as to be calculated to deceive, and although the respondents are persons aggrieved in the colonies, they are not so in the United Kingdom. If the appellants' mark is expunged, the large trade which the respondents have allowed to spring up will be jeopardized, and they will be able to appropriate it, inasmuch as the appellants will not be able to set up a new mark. It would meet the justice of the case if the Court, in the exercise of the discretion conferred by section 90 of the Patents, Designs and Trade-marks Act, 1883, were to limit the user of the appellants' mark to Great Britain.

They asked leave to read certain additional affidavits which had been filed to the effect that the respondents knew in 1891 of the user by the appellants of the red star device, but their Lordships, on being informed that the affidavits did not prove that the respondents

knew in that year of the registration of the words "Red Star Brand," declined to hear the evidence.

Hastings, Q.C., and *John Cutler*, for the respondents, were not called upon.

LINDLEY, L.J. : This case is an important one unquestionably, not only to the Société Anonyme des Verreries de l'Étoile, but to persons interested in trade-marks generally. The case is peculiar, and for this reason : Brooks & Co., who in 1876 registered as their trade-mark for glass a star, complain of a trade-mark which does not consist of a star, but consists of the words "Red Star Brand." At first sight, without knowing what their rights are under their registered trade-mark of a star, there seem to be or might be two different marks, but in order to consider whether they are or not, and in order to see whether the Belgian Société's trade-mark is calculated to deceive, one must consider what Brooks & Co.'s rights are under their registered mark of a star. That depends on section 67 of the Patents, Designs and Trade-marks Act, 1883, the section relating to colours : "A trade-mark may be registered in any colour, and such registration shall (subject to the provisions of this Act) confer on the registered owner the exclusive right to use the same in that or any other colour," so that Brooks & Co., if they liked, could use this star for their glass in any colour they liked—green, red, blue, orange, or anything else. That being so, it seems tolerably clear—it is quite obvious—that the Belgian company could not register in England for glass a red star. Now it does seem a little startling that, if they cannot register a simple red star, they should be enabled to register the description of that very same thing in words ; that is to say, that although they cannot appeal to the eye they may appeal to the ear. I cannot say that is right, and that I understand is the real view taken by the learned Judge in the judgment which has been read. Two marks may be calculated to deceive either by appealing to the eye or to the ear, or one appealing to the eye and one to the ear. Finding that the applicants' glass is sold as "Star glass" or "Star Brand," and bearing in mind that the star may be in any colour, I cannot see that "Red Star Brand" is not calculated to deceive.

So far I think the applicants are aggrieved, and I think that it is

quite plain that if the Belgian company were now seeking to register the words "Red Star Brand" in the face of the evidence before us the comptroller would decline to register—he would decline to register the mark on the ground that it was not a proper trade-mark, having regard to the trade-mark of Brooks & Co. But that is not quite this case. The question now is not whether the Belgian company should be permitted to register this mark, for they did in fact register it in 1890, but the application is to expunge their registered mark, which is a strong thing no doubt to do, and to expunge it after some three years' enjoyment is stronger still.

At first I was disposed to think that there might be some difficulty on the part of Brooks & Co. in expunging after the lapse of three years, but the delay is explained. It was explained to the satisfaction of the learned Judge, and it is plain now, I think, to our satisfaction. The real truth is that, for reasons which I will give presently, Brooks & Co. did not, in fact, know of this registration. How it came to pass that they did not know, considering that the Belgian company must have advertised their application, is, I think, tolerably obvious. Brooks & Co., although they carry on business here, are exporters. They do not sell in this country. There is nothing to prevent their selling. They might expand their business to-morrow for anything I know, but in fact they have not. They are export merchants, and it may well be that, being export merchants, they have not paid that attention to the registration of marks, for the sale of goods in this country, which they would have done if their business had been a retail or wholesale business in this country. That may possibly explain the fact that they did not know, notwithstanding the advertisement, that the Belgian company had, so long ago as 1890, registered this mark "Red Star Brand." Now, it is suggested that there is further evidence forthcoming, but we are told frankly enough by *Mr. Wallace* that the evidence which he proposed to adduce does not touch that particular point. It is not, in other words, evidence that Brooks & Co. did know of this registration in 1890. Apart from that, there certainly has been no delay whatever. They have found out quite recently that the Belgian company's glass—this "Red Star Brand"—is competing with their glass in New Zealand, where they also have a registered

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trade-mark. Having discovered that, they say "We will see if we cannot expunge this mark (the 'Red Star Brand') of the Belgian company." I think they are entitled to do it. It does not at all follow from this, nor is it to be inferred from this, that Brooks & Co. could get an injunction to restrain the Belgian company from using this brand. I say nothing about that. But I think Brooks & Co. are entitled to have the trade-mark "Red Star Brand" expunged, and I think, therefore, the appeal must be dismissed with costs.

KAY, L.J.: I am of the same opinion. The application is made under section 90 of the Patents, Designs and Trade-marks Acts, 1883 to 1888. Under that section the Court may, "on the application of any person aggrieved . . . by any entry made without sufficient cause in any such register, make such order for making, expunging or varying the entry as the Court thinks fit." Therefore, the question is, whether the applicants can show that the entry of which they complain, and which they seek to have expunged, has been made without sufficient cause. Now, I turn back to section 72, and there it is enacted that, "Except as aforesaid . . . the comptroller shall not register with reference to the same goods or description of goods a trade-mark having such resemblance to a trade-mark already on the register with respect to such goods, or description of goods, as to be calculated to deceive." The words in the former Act were "so nearly resembling." They have been altered by expunging those words and substituting "having such resemblance to."

Now, first of all, what does "calculated to deceive" in that section mean? It must mean calculated to deceive by the use of the mark, not by its being merely on the register, but by the use that may be made of it. The question here is certainly a new one. The applicants have registered a device—a star—without any words at all, and the persons against whom they are applying have registered, since the Act of 1888, the words "Red Star Brand" without any device. I doubt whether that could have been done at all under the Act of 1888, for then the mark must have been a fancy word or a device. I do not think "device" would include a

series of words like this. Under the Act of 1888 it seems that words may be registered, because by section 64, sub-section (e), among the things that may be registered are, "A word or words having no reference to the character or quality of the goods, and not being a geographical name." I presume it was registered under that sub-section. Now, have the words which the respondents to this application have registered such a resemblance to the trade-mark which the applicants have put on the register as to be calculated to deceive? *Mr. Moulton*, in his argument, admitted that the applicants having registered the device—the picture of a star—the respondents could not register the word "Star," nor could they register the words "Star Brand." I think that is quite obvious, because, although one appeals to the eye and the other to the ear, they would so nearly resemble as to be calculated to deceive. But *Mr. Moulton* rested his argument chiefly upon the fact that the words "Star Brand" were preceded by the word "Red." He said that made all the difference, and that "Red Star Brand" did not so nearly resemble the device of the star without any colour at all as to be calculated to deceive. Then one cannot help remembering section 67, which provides in effect that the applicants having registered the star without colour may use that star in any colour they like. Therefore they may use a red star, and therefore the addition of the word "Red" does not seem to me to help the respondents, because they are in this position: they could not have registered a picture of a star at all in any colour, and if they had tried to register a red star they would have been met at once by section 67. So, finding they are unable to register a picture of a red star, they try to escape the Act of Parliament by registering the words "Red Star." To my mind the words "Red Star" do so nearly resemble the device of the star which the applicants have registered as to be calculated to deceive, and I confess I should come to that conclusion even without the evidence that is before us; but the evidence that is laid before us, particularly the evidence of the respondents' witnesses, seems to me to put that absolutely beyond question, because a number of them say that if glass was inquired for by the word "Star" only they should deem it to mean the respondents' glass. Anybody using a device of a star on glass is using that which would be taken

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to mean the respondents', and therefore would seriously interfere with the trade of the applicants, and if they might put upon the register a device which everybody would understand to mean that the respondents' was the "Star" glass, all I can say is they would then be putting upon the register a thing so nearly resembling the star of the applicants as to be calculated to deceive.

The only other question is whether there has been so much delay that the applicants should, on that ground, be refused relief. I think the evidence deals with that point effectually. The applicants did not know until within a very few weeks before their application was made that this mark had been registered at all, and therefore there is no question of delay. They came as soon as they could. They were led to the discovery by the fact that they found in the colonies, where their principal trade is carried on, that they were being competed with by glass under the name of the "Red Star Brand." That put them upon inquiry, and then they found, I understand, that these words, "Red Star Brand," were upon the register in England. I think, therefore, the decision of the learned Judge was right, and the appeal fails.

A. L. SMITH, L.J. : I agree. I have nothing to add.

Appeal dismissed.

Solicitors : *C. Urquhart Fisher*, for the Appellants.

Ernest Salaman, Fort & Co., for the Respondents.



IN RE PRINTING TELEGRAPH & CONSTRUCTION CO.
OF THE AGENCE HAVAS, EX PARTE CAMMELL.

1894, April 16, 17, 26. LINDLEY, LOPES AND KAY, L.JJ.

Company—Director—Qualification Shares—Register.

Informal documents, such as share allotment sheets, intended merely to provide materials for compiling a formal register of members and not to be a register themselves, do not constitute a register within the meaning of section 25 of the Companies Act, 1862.

Where articles of association provided that, if a first director failed to get his qualification shares within a month of the first general allotment his office should be vacated, and C., a first director, to whom the requisite shares were allotted without his knowledge, and who having acted as director within the month, resigned after the month had expired but before his name was, as it subsequently was, put on the register in respect of the shares, the Court ordered his name to be removed from the register as having been put on without sufficient cause.

APPEAL from Stirling, J. (1).

The above-named company (which was not in liquidation) was formed in March, 1893, with a memorandum and articles of association dated 16 March.

Article 62 provided that "the first directors should be appointed by a majority of the subscribers to the memorandum of association of the company," and article 64 that "the qualification of a director should be the holding of 200*l.* of share capital, in respect of which all calls for the time being due should have been paid, and that qualification should apply as well to the first directors as to all future directors, but such first directors should be allowed one month from the first general allotment of shares of the company in which to acquire their qualification." Article 70 provided that "the office of director should be vacated," *inter alia*, "(c) if he ceased to hold the requisite number of shares, or, in the case of a first director, if he failed to get them within the prescribed time; (d) if he sent in a written resignation to the board, and the same were not withdrawn for seven days or were previously accepted."

The applicant, Charles Cammell, signed the memorandum of association for one share, and was appointed one of the first

directors. On 19 March the first board meeting was held, and the applicant attended. On 29 March a second board meeting was held, but the applicant was not present. At that meeting a resolution was passed for the allotment of shares in accordance with certain allotment sheets, which included the name of the applicant in respect of forty shares of 5*l.* each, for which, however, he never made any application, but which, notwithstanding, were allotted to him, and his name was subsequently, but not until 23 May, transferred from the allotment sheets to the register book in respect of them. On 7 April the third board meeting was held, and the minutes of the previous meeting were read, but the applicant was not present. On 14 April the fourth board meeting was held, and the applicant was present; the minutes of the last meeting were read. On 29 April the period of one month from the first general allotment expired. On 1 May the secretary of the company wrote to the applicant informing him that a board meeting would be held on the 5th, and enclosing to him, at the instructions of the directors, a common form of application for shares, with a request that he should sign and return the same together with a cheque for 10*l.*, the amount due on application (being 5*s.* per share on forty shares of 5*l.* each). On 5 May the secretary again wrote, informing him that a board meeting would be held on the 9th, and proceeding: "I am requested by the board to ask your kind attention to the enclosure I forwarded to you at their request on the 1st instant, as the time allowed by the articles of association for the directors to qualify has expired, and the board is anxious that all should comply with the clause relative to this with as little delay as possible." On 7 May the applicant wrote to the chairman of the company saying that he came to London on the 5th to attend the board meeting, but on his arrival in London received a telegram calling him north; the letter proceeded: "I had to see Mr. Sandys on some business, and I informed him it was quite impossible I could remain on the board, and that when I consented to take a seat on the board I understood from him that there would be very little to do on this side, and that it was not fair on the other directors that I should remain on and take fees and not be able to attend, and he quite agreed with my views. I cannot attend the meeting on Tuesday next," the 9th, "and I have nothing else to do

but tender you my resignation. If it is necessary for me to send a formal notice to the secretary I will do so, and I shall be obliged by your reading this at the next meeting." On the same day the applicant wrote a formal letter to the secretary in the following terms: "I herewith send you my resignation as director of the above company, and I have written to Colonel Engledew, the chairman, my reasons for so doing. I return the enclosed form of application for shares, which will not now require my signature." On the 11th he again wrote to the chairman, saying that he did not wish any harm to the company, and he did not see that his resignation would do any, and adding that "in looking through the articles he found he was not a director, as he had failed to qualify in the prescribed time," and concluding, "So at present I am not a director according to the articles of association." On the 15th the chairman wrote back that the company's solicitors considered that, as the applicant's name was on the allotment sheets, and the applicant was liable for the qualification, the required condition was fulfilled. On the 31st the applicant wrote to the chairman that he was advised that by the articles he was certainly not a director, but that he would be if he qualified, which, therefore, under the circumstances, he was not prepared to do. On 26 July the applicant, having heard that his name had been put upon the register, wrote to the secretary as follows: "I have been informed that my name is on the register of the above company; if so, I shall be obliged by it being immediately struck off as I have never signed any application for shares. An answer will oblige." The secretary replied that the letter should be placed before the board. Nothing further appeared to have happened till September, when the applicant received a notice calling on him to pay 85*l.* in respect of the shares.

On 1 November notice of motion was given on behalf of Mr. Cammell for rectification of the register by removing his name therefrom in respect of the forty shares on the ground that he never applied for or agreed to take or accepted any allotment to him of the shares, and on 16 January, 1894, STIRLING, J., (before whom the case was dealt with on the footing that the applicant's name had been put on the register when the allotment was made on 29 March) being of opinion that the applicant did not him-

self, till the middle of May, understand that his name had been entered on the register, and, that he had not so acted as to have estopped himself from denying that he agreed to take the shares in question, made an order in accordance with the notice of motion.

The company appealed.

Buckley, Q.C., and *E. Ford*, for the appellants :

The applicant contracted to take the shares, and is estopped from denying the contract.

They referred to *Hewitt's case* (2), *Brown's case* (3), *Miller's case* (4), and *Ex parte Inchiquin* (5).

Graham Hastings, Q.C. (*G. P. C. Lawrence* with him), for the respondent :

If you omit the registration, *In re Wheel Buller Consols* (6) is not only this case, but this case is much stronger.

[KAY, L.J. : It is conceded to you that, if there is no registration, there is no contract, but according to Lord SELBORNE in *Brown's case* (3), where there is registration, there must be taken to have been authority to make it.]

There is no evidence that the applicant's name was put on the register when the allotment was made, and in the face of the letters of the proper officer of the company, subsequent to that, asking for the respondent's authority to put him on the register, the company cannot be heard to say he was already on it.

[LINDLEY, L.J. : I have been quite under a misapprehension if what you suggest is the fact. It is extremely important, and we ought to find this out.]

(The case accordingly stood over for it to be ascertained when the respondent's name was placed on the register ; and, it coming on again for hearing on 26 April, it appeared from the evidence of the secretary and a clerk of the company that the register book was

(2) 25 Ch. D. 283 ; 53 L. J. Ch. 343 ; 49 L. T. 479 ; 32 W. R. 234.

(3) L. R. 9 Ch. 102 ; 43 L. J. Ch. 153 ; 29 L. T. 562 ; 22 W. R. 171.

(4) 3 Ch. D. 661, affirmed 5 Ch. D. 70.

(5) [1891] 3 Ch. 28 ; 60 L. J. Ch. 556 ; 64 L. T. 841 ; 39 W. R. 610. .

(6) 38 Ch. D. 42 ; 57 L. J. Ch. 333 ; 58 L. T. 823 ; 36 W. R. 723.

written up, the names being taken from the allotment sheets, on 23 May, 1893, before which date there was no register book.)

This being so, the question is whether the allotment sheets constitute a register. We say they do not; they were never intended to be a register, but were intended to provide materials from which to make up the register; they refer, in the last column, to the register, and thus show on the face of them that they were not the register.

[The COURT referred to *Weikersheim's case* (7), per Lord Justice JAMES, and *In re Underbank Mills Cotton Company* (8).]

If, then, the respondent was not on the register on 7 May, the case is covered by *Hewitt's case* (2) and similar cases.

Buckley, Q.C., in reply:

The allotment sheets constituted a register. If any one had come to the office of the company on 30 March and asked to see the register of members, as he would have a right to do, these sheets would have been shown to him; the secretary would have been bound to show him these; they were the register from 30 March to 23 May.

After 29 April, when the month limited for acquiring the shares expired, there was an executed contract between the respondent and the company to take the shares from them just as strong as in *Isaacs' case* (9). Before 29 April he might have acquired the necessary shares elsewhere, but, not having done so, he must be taken to have elected to take them from the company, who were thenceforward entitled to put his name on the register; there was a continuing application on his part from that date.

It does not lie in the respondent's mouth, he being a director and it being his duty to see that a register was properly existing, to say that the allotment sheets did not constitute a register, there being no other up to 23 May.

LINDLEY, L.J.: I do not think that we ought to reverse the decision of Mr. Justice STIRLING in this case. [His Lordship stated the facts, and referred to the provisions of articles 64 and 70, and proceeded:]

(7) L. R. 8 Ch. 831, 836; 42 L. J. Ch. 435, 437; 28 L. T. 653, 655; 21 W. R. 612, 614.

(8) 31 Ch. D. 226; 55 L. J. Ch. 255; 53 L. T. 957; 34 W. R. 181.

(9) [1892] 2 Ch. 158; 61 L. J. Ch. 481; 66 L. T. 593; 40 W. R. 518.

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When Mr. Cammell applied to the Court to rectify the register, his name was undoubtedly upon it, but his case is that it had been put on without sufficient cause. The questions we have to consider are, When was his name put on the register? and, On what authority was it put on? It is argued on behalf of the company (and it was assumed in the Court below) that a proper register was in existence with his name on it before he sent in his resignation on 7 May. But it has turned out, upon investigation into the matter, that up to 23 May the only documents that had his name on them which could be called a register were certain allotment sheets upon which his name had been put on 29 March.

The question is, Can those allotment sheets be regarded as a register? I think the authorities show that informal documents, though not strictly complying with the statutory provisions, may be regarded by the Court as constituting a register, if they were intended by the parties to be so. But I do not think there is any authority for saying that documents which are intended merely to be, and to provide, the materials from which the formal register is to be made up can constitute, and I do not think they ought to be held to constitute, a register. These allotment sheets were not, as the evidence clearly shows, intended to be the register. They themselves referred to the register which was to exist; and they were themselves materials for making the register, and were not the register itself. We should be straining what I think to be the true view if we were to hold that these allotment sheets constituted the register.

This being so, Mr. Cammell's name was never on the register itself until after he had resigned. Was there, then, any authority given on his part for it to be put on? The company says there was. It is argued that, when the month allowed for acquiring the necessary shares expired on 29 April and Mr. Cammell had not acquired them, there was an executed contract by him to take them from the company and the company was entitled from that date to put his name on the register, and in support of this contention *Isaacs' case* (9) was cited. But I do not think the present case is so strong a case as *Isaacs' case* (9). I do not think here there was any sufficient authority for the company to put Mr. Cammell's name on the register whether he liked it or not. He never signed any

application for shares which were sent him. He did not attend any meetings after the month had expired. I do not think the company had any authority to put his name on the register after he had notified his resignation.

I think, therefore, that Mr. Cammell's name was entered on the register without sufficient cause, and that the appeal must be dismissed with costs.

LOPES, L.J.: Mr. Cammell's name was not entered on the formal register till after he had resigned his office of director. No formal register indeed existed until 23 May.

But it is said that certain other documents ought to be regarded as constituting a register, namely, these allotment sheets. I am of opinion that they do not constitute a register. They are headed "Allotment Sheets." They provide materials for making out the register. There are in them omissions of certain things which would appear in the proper register. They were never intended to be the register; in fact, they themselves refer in the last column to the register, to be subsequently made up. I do not think it possible to regard them as constituting the register; consequently, Mr. Cammell resigned before his name was entered on the register.

But, then, it is further said that, as Mr. Cammell did not resign before 29 April, there was after that date a continuing authority on his part to place his name on the register. But it is plain that the company could not have regarded him as being a shareholder before his resignation, for they sent him only just before that a form of application for the shares. I am of opinion there was no such continuing authority as is contended for, and that the decision of Mr. Justice STIRLING was right, though it proceeded on different grounds from those upon which we are deciding the case.

KAY, L.J.: In all cases of this sort, in which a director has been duly appointed and has acted as such, and ought in so acting to have had shares to qualify him, I am extremely reluctant to allow him to escape from the position he has put himself into, and only do so if I am obliged. But in the present case I feel myself obliged. My view of the law is summed up in what Lord SELBORNE says in *Brown's case* (3): "The other authorities are all cases in which, as

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a matter of fact, shares had been registered in the name of the director—which circumstance occurs in this case also—and in those other cases it was, in my opinion, most justly regarded as a very material fact to be considered, when a director tried to get rid of the shares actually registered in his name, that he had accepted the office of director which a man ought not to fill without qualification. In such cases a director must have a qualification, and is bound as a director to be acquainted with what is done in the management of the affairs of the company. It was, therefore, a just conclusion of fact that an act done by a person acting under the authority of the directors, the result of which was to place in the name of a director shares which he ought to have as a qualification—that that act was done by his authority, and that he could not be allowed to repudiate it. For my part, I see no reason to doubt that the various cases which arose on that state of circumstances were well decided.” Then after commenting on certain cases, Lord SELBORNE goes on: “The true result to be drawn from these authorities appears to be that the fact of a man accepting the place of director, for which the possession of a certain number of shares is a necessary qualification, is most material in determining whether he shall or shall not be permitted to repudiate, as unauthorized by himself, the registration of shares which, in the ordinary course of the business of the company, have actually been placed in his name and which were needful for his qualification.”

The first question we have to determine is whether certain allotment sheets—sheets of paper attached to one another—constitute a register within the meaning of section 25 of the Companies Act, 1862. If they had been treated as the register till the formal register book had been prepared, I should have been inclined to hold that there had been a sufficient compliance with the statutory requirements, and it would have been difficult in that case for Mr. Cammell to escape from the position in which he would have found himself. His name was entered on the allotment sheets before the shares were actually allotted to him. He was not present at the meeting of 29 March. The month for obtaining qualification shares expired on 29 April, and during that month he had acted as a director. After that date he never attended any board meeting, but

he recognized that he was a director, and sent his excuses for non-attendance. When he sent in his resignation on 7 May, there was no other register existing than the allotment sheets, and for the reasons which have been given by Lord Justice LINDLEY and Lord Justice LOPES I am reluctantly compelled to think that these sheets do not constitute a sufficient register. That being so, I am unwillingly obliged to hold that until 23 May Mr. Cammell's name was not upon the register.

But on 23 May his name was transferred to the register. And it is said on behalf of the company that he must be held bound by an agreement to have his name put on from 29 April, when the month expired. And *Isaacs' case* (9) was cited. But I do not think we have in the present case anything like *Isaacs' case* (9); there the articles provided that, unless the qualification shares should be acquired within a month, the director should "be deemed to have agreed to take the said shares from the company, and the same should be forthwith allotted to him accordingly."

I have had considerable difficulty on the point of whether the mere fact of Mr. Cammell's resignation on 7 May was a revocation of an authority given to the company to place his name on the register as a shareholder. Till 7 May he must, in my opinion, and according to the authority of Lord SELBORNE, be held to have authorized the proper officers to put his name on the register, and if in the interval between 29 April and 7 May his name had been so put on, I think that the case could not be treated as if the authority had been determined before 7 May, and that his name would have been properly placed on the register. Was, then, the mere fact of his resigning his position of director on 7 May a determination of the company's authority to put his name on, the obligation which the articles put upon him to acquire the necessary shares having commenced at the time when he first took upon him the position of director? It is not, however, necessary to give an opinion on this point in the view I take, for we have these further facts: on 1 May a form of application for shares was sent to him by the secretary of the company; he did not sign the application, and on the 5th the secretary again wrote, but still Mr. Cammell did not sign, but returned the form unsigned. These facts, together with his formal resignation, are in my opinion sufficient to determine

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the authority to put his name on the register, and I think, therefore, it was put on improperly. I regret that I feel myself unable to treat him as a shareholder properly on the register, for, if I could and speaking for myself, I should certainly be inclined to do so.

Appeal dismissed.

Solicitors: *Beyfus & Beyfus*, for the Appellants.

Slaughter & May, for the Respondent.

SMITH v. HANCOCK.

1894, March 19; April 9, 23. LINDLEY, KAY & A. L. SMITH, L.JJ.

Contract—Sale of Goodwill—Agreement “not to carry on or be in anywise interested in” business of Grocer—Similar Business set up by Vendor’s Wife—Separate Estate—Injunction.

On the sale of a grocery business the vendor agreed “not to carry on or to be in anywise interested in” the business of a grocer within five miles from the old shop for a period of ten years. Six or seven years afterwards the vendor’s wife, out of her own separate money, set up in her own name—i.e. in the name of her husband, with the prefix “Mrs.”—a grocer’s shop close to the place where her husband had formerly carried on business, and was assisted by her nephew. The vendor helped his wife to get a lease of the shop; he introduced her to a local bank, where she opened an account in her christian and surname, and he introduced the nephew to certain wholesale provision merchants who had supplied him in his business, and induced them to give the nephew credit; he assisted in the preparation of a circular inviting old friends and customers to deal at his wife’s shop, and distributed this circular among various friends. He had not, however, any pecuniary interest in the business, and did not otherwise than as above stated concern himself in it.

Held (dissentiente KAY, L.J.), that the vendor did not carry on, and was not interested in, his wife’s business within the agreement.

APPEAL from a judgment, dated 23 November, 1893, of Kekewich, J. (1).

The defendant, T. P. Hancock, formerly carried on in his own name the business of a grocer, provision dealer and baker, in a shop in Heathcote Street, Kidsgrove, Staffordshire. He had no children, and was assisted in the business by his wife, Agnes Hancock, and her nephew, John Kerr. In March, 1886, the defendant sold the business premises and the goodwill of the

(1) [1894] 1 Ch. 209; 63 L. J. Ch. 201; 70 L. T. 163.

business to the plaintiff for 2,000*l.* (exclusive of the stock-in-trade), and entered into an agreement, dated 31 March, 1886, "not to carry on or be in anywise interested in the business of a wholesale or retail grocer and provision dealer and baker, or any of them," within a distance of five miles from the shop in Heathcote Street, during a period of ten years. The defendant thereupon ceased to carry on any business. In 1893 the defendant's wife was desirous of starting her nephew Kerr in the business of a grocer, but her husband at first objected to her doing so. She had some separate property, which consisted partly of money belonging to her before marriage and partly of savings made by her with the knowledge of the defendant out of the allowance which he gave her for house-keeping expenses. The defendant had assented to these savings becoming the separate property of his wife, and with 200*l.* of this money she took a shop in Kidsgrove, situate at a distance of about 200 yards from the plaintiff's shop, and there the business of a grocer was carried on in the name of "Mrs. T. P. Hancock." The business was conducted by Kerr, although Mrs. Hancock took some part in the management on Saturdays, which were very busy days. All goods were ordered and paid for in her name, by cheques signed "Agnes Hancock, p.p. John Kerr," and were drawn by her nephew upon a banking account which she opened in the name of Agnes Hancock. The lease of the premises was taken in her name. The moneys received from the business by Kerr were accounted for by him to her, and were applied by her in paying the weekly outgoings and the wages and board of her nephew. The defendant assisted his wife in the negotiations for the lease of the shop, and as she was at that time unable to use her right hand on account of rheumatism in it, he wrote out a circular which was issued when the new business was opened. The circular contained the following statement: "New Grocery and Provision Establishment, Market Street, Kidsgrove. Mrs. T. P. Hancock has opened the above shop with a new and well-selected stock of groceries and provisions, and will be pleased to see all old and new friends. Mrs. T. P. H. intends selling at prices that cannot be beaten in or out of the Potteries." Then certain teas were mentioned and their prices, and among such teas was "Mrs. Hancock's well-known mixture," which referred to a tea sold by the defendant under that name when he was in

business. The circular concluded with the words, "Note the address—Mrs. T. P. Hancock, Market Street, Kidsgrove (opposite Dickinson's, draper)." The defendant distributed copies of this circular among various persons, some of them being old friends and customers; he introduced Kerr to certain wholesale provision merchants who had supplied him in his former business; and he was present at the local bank when his wife opened the account in her own name. The defendant did not, however, in any other way concern himself in the business, nor otherwise render any services in the management of it.

The plaintiff claimed an injunction to restrain the defendant from carrying on or being in anywise interested in the businesses of a wholesale or retail grocer and provision dealer and baker, or any of them, within the distance and during the period stipulated for by the agreement of March, 1886, and damages. KEKEWICH, J., being of opinion that the defendant was not "interested" in the business within the meaning of the agreement, held that there had been no breach of the agreement by the defendant, and refused to grant an injunction.

The plaintiff appealed.

Warmington, Q.C., and *Tyssen*, for the appellant :

The respondent, by his acts in connexion with the business established by his wife, has brought himself within the scope of the covenant, for he has interested himself in the business. It is not necessary to prove that he was pecuniarily interested in the business. "Carrying on" is not confined to carrying on as principal, but it may be done through an agent. Mrs. Hancock is in the same position as a stranger, and if she had been a stranger the respondent would have been liable: *Hill v. Hill* (2). At one time the words "carry on" were construed as meaning to carry on for the person's own benefit, the foundation for such construction being the statements of Lord Justice TURNER in *Clarke v. Watkins* (3); but if that case were to come before the Court now the decision would be different. Acting as manager for another person would be a breach of the covenant: *Newling v. Dobell* (4); or as a journeyman: *Jones*

(2) 55 L. T. 769; 35 W. R. 137.

(3) 8 L. T. 8; 11 W. R. 319.

(4) 38 L. J. Ch. 111; 19 L. T. 408.

v. *Heavens* (5), *Baxter v. Lewis* (6). The appellant is therefore entitled to an injunction, even although there may not be a continuing breach of the agreement.

Renshaw, Q.C., and *Brinton*, for the respondent :

The covenant in question is a limited one, and not in the usual form, which is to the effect that the person should not carry on or be directly or indirectly interested in the business. "Carrying on" is, according to the authorities, carrying on business as owner. "Interested" means having an interest or share, having money involved: *Imperial Dictionary*. Supposing Mrs. Hancock had no separate estate, and the respondent had lent her money to carry on the business, but had no charge for the same on the business, he would not be within the covenant: *Bird v. Lake* (7). Provided there is no lien on the business or profits, there is no breach of the contract, and although the respondent would in a sense be interested, he is not carrying on the business. If he became bankrupt to-morrow or if judgment were recovered against him, the property could not, we submit, be taken from his wife. The goodwill in this case was more of a local than a personal nature, and after the lapse of seven years it would necessarily change. The right to such goodwill depends entirely on the covenant, and in the absence of any covenant the respondent could have at once set up a similar business next door to the old shop: *Pearson v. Pearson* (8). The Court will not extend the meaning of these covenants beyond their strict and proper meaning: *Allen v. Taylor* (9). The money with which Mrs. Hancock started the business was her own separate property: *In re Whitehead* (10). There was no sham or fraudulent design in connexion with the starting of the business. An injunction against the respondent would not be an effectual remedy, as he does not carry on the business and could not prevent his wife from carrying it on in her own name, which is Mrs. T. P. Hancock.

(5) 4 Ch. D. 636; 25 W. R. 460.

(6) 30 Sol. J. 705, 754.

(7) 1 H. & M. 111, 338; 8 L. T. 632.

(8) 27 Ch. D. 145; 54 L. J. Ch. 32; 51 L. T. 311; 32 W. R. 1006.

(9) 22 L. T. 651; 19 W. R. 35.

(10) 14 Q. B. D. 419; 54 L. J. Q. B. 240; 52 L. T. 597; 33 W. R. 471.

Warmington, Q.C., in reply :

Husband and wife cannot be treated as two ordinary persons, for he is presumed to have an interest in his wife's life and can insure it. He is *primâ facie* interested in the business carried on by his wife and in its pecuniary success, and it is only necessary to prove that he "in anywise" interested himself in the business.

April 23.

Cur. adv. vult.

LINDLEY, L.J. : This is an appeal from an order of Mr. Justice KEKEWICH, refusing an injunction to restrain the defendant from breaking an agreement, into which he entered with the plaintiff on the occasion of the sale to him of a business formerly carried on by the defendant. The defendant formerly carried on business as a grocer, provision dealer and baker under the name of T. P. Hancock, in Kids Grove, Staffordshire. His wife Agnes assisted him in his business, as did also a nephew of hers named John Kerr. In March, 1886, the defendant sold this business to the plaintiff, and agreed "not to carry on, or be in anywise interested in, the business of a wholesale or retail grocer and provision dealer and baker, or any of them," within a distance of five miles from the old shop, for a period of ten years. This agreement, it will be observed, is personal to the defendant ; it binds him and him only ; it does not extend to any one else, or make him answerable for the conduct of any one but himself. In the next place, his obligation is confined to abstaining from two lines of conduct, viz., (i.) carrying on any of the businesses specified, and (ii.) being in anywise interested in any of those businesses. The agreement, like every other agreement, must be construed with reference to the subject-matter to which it relates, and so as to give effect to, and not to defeat, the object to attain which the agreement was entered into. This object is plain enough ; it was to secure the plaintiff from the competition of the defendant. But, although this is the object, it is not in accordance with sound legal principle to give to the language of the agreement a wider interpretation than that language properly bears. The duty of the Court is confined to enforcing the agreement entered into, and it is not permissible to extend it so as to make the defendant responsible either for the conduct of other people besides himself or for conduct which does not amount to carrying on or being in any

way interested in one of the prohibited businesses. These principles are elementary, and their application to such cases as the present is well exemplified by the case of *Bird v. Lake* (7). I pass on to consider what the defendant has done, and what others have done, for which it is sought to make him responsible. The defendant himself *bonâ fide* retired from business, and he has not himself made any attempt whatever to carry on business, nor does he carry on any business himself, nor has he attempted to acquire, nor has he in fact any interest whatever in any business. The learned Judge who saw the witnesses came to this conclusion, and I not only see no reason to differ from him, but I am satisfied that the evidence warrants the conclusion arrived at. What has been done is this: Some six or seven years after the sale of the business the defendant's wife set to work to start her nephew John Kerr in business. She had some 200*l.* of her own. The evidence on this point satisfied the learned Judge that she had separate estate to this amount, and again I agree in his conclusion. She took a grocer's shop near the plaintiffs. She painted up "Mrs. T. P. Hancock," and her nephew Kerr has carried on business there since with her help and under her name. She lives with her husband (the defendant) at another house, but she goes every now and then to the shop, and is generally there two days a week. The defendant certainly assisted her and Kerr to start this shop, although at first he objected to the scheme. But he helped his wife to get a lease of the shop, he introduced her to a local bank, where she opened an account in her own name; and he introduced Kerr to wholesale suppliers of grocery and other goods, and so induced them to give him credit. The defendant further assisted in the preparation of a circular, inviting old friends and customers to deal at the shop, and "Mrs. Hancock's mixture," which was some tea which he used to sell when he was in business, was prominently referred to in the circular. Further, he gave this circular to two or three old friends and customers. The defendant, however, has no pecuniary interest in the business; he is not liable for the debts contracted by his wife or by Kerr in carrying on the business; and the profits, if any, cannot be claimed by the defendant. All moneys received and paid in respect of the business pass through his wife's account at the bank, and on this account the defendant has no power to draw.

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The wife pays Kerr a salary and, as I gather, a share of the profits. Now it cannot be denied that this proceeding is calculated to injure the plaintiff, and no one can be surprised at his being greatly annoyed by it. If the evidence admitted of the conclusion that what was being done was a mere cloak or sham, and that in truth the business was being carried on by the wife and Kerr for the defendant, or by the defendant through his wife for Kerr, I certainly should not hesitate to draw that conclusion, and to grant the plaintiff relief accordingly. But I find it impossible to avoid the conclusion that the business is being carried on by the wife primarily for Kerr, and, perhaps, to some extent, for herself. But, there being at present little or no profit, she has not yet got any money out of the business for herself. This being the state of the case, I am unable to hold that the defendant has done, or is doing, or is threatening or intending to do, what he agreed not to do. The utmost that can be said is that he has assisted his wife and Kerr to do what he agreed not to do himself. No honourable man would have done that, and no honourable man would, if he could help it, allow his wife to do what she has done and is doing. But, as a matter of law, I cannot say that the defendant is breaking his agreement. In *Bird v. Lake* (7) it was held that to help a man to carry on business by lending him money without security was not a breach of a covenant "not to carry on or be engaged in the business or any matter or thing whatsoever in anywise relating thereto." So here, to help Kerr to carry on business by introducing him to persons who would furnish him with goods on credit, and by further assisting him through Mrs. Hancock, cannot, without straining the words of the defendant's agreement, be held to be a breach of that agreement. A married woman with separate estate has a right to carry on business in her own name—i.e., in the name of her husband, with the prefix "Mrs.," and I am not aware that he can prevent her from so doing by any legal proceedings. Even if he can he is under no legal obligation to do so, unless he has imposed such an obligation on himself by some contract. An agreement by a husband not to do a thing does not oblige him to prevent his wife from doing that same thing if she has a right to do it independently of him. Whether the defendant in this case could

or could not prevent his wife from assisting her nephew Kerr I do not know. The defendant does not say that he has endeavoured to do so and has failed. But, supposing he could do so, he has not agreed to do so, nor to try to do so, and the Court cannot itself impose any such obligation upon him. It is urged that, even if the defendant is not carrying on the business, he is in some way "interested" in it, that he is interesting himself in it, and that he can be restrained, and ought to be restrained, from so doing. As the defendant and his wife are living together, I have no doubt that he is interested in her, and perhaps also in her nephew Kerr. Further, if the wife gets any profit out of the business she may very likely make use of it in adding to her husband's comforts. But I cannot say that he is in any way "interested" in the business which she has started and is carrying on for Kerr. What interest has he in that business? Certainly no pecuniary interest. His only interest is that indirect interest which every man has in the happiness and welfare of his wife. But to have such an interest as this is no breach of the defendant's agreement. When a person sells a business and agrees not to carry on, or be in any way interested in, any similar business, the word "interested" is used to prevent him, not only from carrying it on, but also from having any proprietary or pecuniary interest in it. An injunction to restrain the defendant from carrying on, or being in any way interested in, the business would not be broken if the defendant were to repeat what he has done for Kerr, and is doing, by living with his wife without trying to stop what she is doing. I have reluctantly come to the conclusion that the plaintiff is not entitled to an injunction in this case, and his appeal must be dismissed, but, under the circumstances, not with costs. This case is one of general importance. Conveyancers will have to exercise their ingenuity in devising some method of stopping a wife with separate estate from carrying on a business in rivalry with a purchaser of a similar business from her husband. The agreement entered into in this case, to which the wife is not a party, does not cover such conduct, nor do the common forms at present in use. The old doctrine that the husband and wife are one person is inapplicable; they are not one with reference to her separate estate; his obligations are not hers, nor are hers his.

KAY, L.J. [who differed from the other members of the Court, after reading the agreement entered into by the respondent continued:] The object of this agreement was obviously to secure to the purchaser the goodwill free from interference by the vendor. For this purpose the vendor agreed not to carry on or be in anywise interested in a similar business. If he did he would attract some of the old customers, and draw them away from the purchaser. It seems to me clear that it is not confined to a pecuniary interest. If he carried on, or was in anywise interested in, a like business which drew away the old customers from the purchaser or otherwise diminished his receipts, though he took no pecuniary benefit from that business, the injury to the purchaser would be the same. Then "carry on" does not mean "exclusively" carry on, or even "principally." If he became partner with other persons, even a dormant partner, or if he contributed capital to aid a like business, or became manager, I should think he would have broken this agreement. So any active assistance in the business, particularly any such as was intended and calculated to attract his former customers and to take them away from the purchaser, would, in my opinion, be a "carrying on" within the meaning of those words as used in this agreement. I am also of opinion that being "interested in" means something short of "carrying on," and when coupled with the words "in anywise" a very large meaning should be given to those words in furtherance of what seems to me the obvious intention. The defendant for some years observed this agreement. He sold his other shop, and gave up business altogether. However, in 1891 or the beginning of 1892, his wife, being desirous of helping her nephew Kerr, persuaded the defendant to assist her in setting up a business like that which he had sold. He says that he objected to do this, and resisted. But what he actually did was this. He paid to his wife a sum of 110*l.*, which he says she had given to him to invest, being the savings which he had allowed her to make out of house-keeping moneys which he gave to her weekly. With this money and 90*l.* which she had in cash, the wife took a small shop in Market Street, within two hundred yards from the shop in Heathcote Street which he had sold, and there commenced, and is carrying on with the aid of her nephew Kerr, a business identical

with that which the defendant had sold. Kerr lives with the defendant. He receives a small weekly payment for his assistance, and a small share of the profits besides; after deducting 10s. a week for Kerr's board, the rest of the profits goes to the defendant's wife. The Judge has found that this is the wife's separate business and that the money employed in it is her separate property, and I assume that to be the case. The defendant has taken an active part in establishing this new business and in endeavouring to induce his former customers to support it. He drew out with his own hands a form of circular. [His Lordship read the circular as set out above, and continued:] T. P. Hancock is the defendant's name. In that name his former business was carried on. The announcement that the new business is carried on in that name, with only the prefix "Mrs.," the reference to old friends, meaning customers in the former business, the mention of "Mrs. Hancock's well-known mixture" of tea, which refers to a tea sold by the defendant in his former business under that name, as she admits, show plainly that the object and intention of the defendant was to obtain for this business, which he assisted his wife to set up, some of the goodwill which he had sold to the plaintiff. After the new shop was opened the defendant personally distributed this circular to various persons. He admits that he did so to the extent of some twenty copies, and thus he rendered active assistance in carrying on the new business. Besides this, he took Kerr to Liverpool and Manchester and introduced him there to four wholesale dealers who had supplied the defendant in his former business, and he induced them to supply the wife's business in the same way. He negotiated the lease of the new shop to Mrs. Hancock. He introduced her and Kerr to the lawyers who drew the lease. He went to a bank, and there opened an account in his wife's name to which the receipts of this business were paid. His wife and he are living together, and any profits she may receive he will have the benefit of while that state of things continues. Suppose that he should in future repeat these and similar acts, could it be said that he was not "carrying on" or was not "in anywise interested in" this business? In my opinion it could not. I think that what he has done has been a breach of the agreement in both its branches. He has been assisting in carrying on this business, and it seems to me im-

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possible to say that he is not "in anywise interested in" it. It is not necessary, but I do not think it would be improper, to construe the words "in anywise interested" as meaning "shall not in anywise actively interest himself in the business so as to interfere with the goodwill which he has sold." What the defendant has done seems to me to be a deliberate attempt to defraud the plaintiff by getting back some of the goodwill which the defendant sold to him. It is a principle of English law that a vendor shall not, after the sale, derogate from his own grant. For example, if a man sells a house with windows in it looking over his adjoining land he cannot afterwards build upon that adjoining land so as to obscure such windows. *Palmer v. Fletcher* (11), which is one of the leading authorities on that law, was decided in the King's Bench in 1662, 230 years ago. It was formally approved by Lord Holt in *Tenant v. Goldwin* (12), and is constantly cited at this day as undoubted law. If a man sells the goodwill of a business I have never been able to understand why the same principle should not apply. It is an anomaly by no means creditable to the law that there is an exception to the rule in that case, and it is therefore necessary to obtain an express contract from the vendor not to carry on a like trade. But, when there is such a contract, I am inclined to construe it as much as can fairly be done in favour of the intention to prevent any derogation from the value of the thing sold. I think that an injunction ought to be granted against the defendant in the words of the agreement which I have read, to restrain him, his servants, and agents from carrying on or being in anywise interested in the business set up in the name of his wife, or any similar business during the ten years mentioned in the agreement, within five miles from the premises in Heathcote Street, and that the defendant should be ordered to pay the costs here and below.

A. L. SMITH, L.J. [after stating the facts, continued:] My brother KEKEWICH arrived at the conclusion that the business set up and carried on by the defendant's wife was a business set up and carried on by her trading as a *feme sole* with her own separate property in order to benefit her nephew, and that in so

(11) 1 Lev. 122.

(12) 2 Ld. Raymond at p. 1093.

doing she in no way acted on behalf of or in the interest of the defendant, her husband ; that the business was in reality that of the wife and not of the husband ; and that the case made by the plaintiff that what the wife did was but a cloak and device in order to enable her to do so ostensibly on her own account, but in reality as her husband's agent, what he could not without breaking the covenant, was untenable and not the truth. That the object of the wife in opening the business for the nephew at the place in question was to obtain as much as she could of the goodwill of the old business for which her husband had received the 2,000*l.* is to me apparent. The circular which was issued and the placing up of the name of "Mrs. T. P. Hancock" upon the fascia of the shop, coupled with the other circumstances of the case make this obvious. That her conduct is reprehensible is beyond dispute, and also that of her husband, for reasons which I will hereafter state. It is true that this case may be opened in such a way as to lead to the inference that the whole thing was a sham concocted by the husband and wife in order to evade his agreement, and indeed this appeal was so opened ; but having heard counsel on the defendant's behalf, and having re-read the evidence since the argument was closed, I have arrived at the conclusion that Mr. Justice KEKEWICH was right in the decision which he arrived at when he held that it was the real business of the wife and not that of the husband, and that there was no attempted deception in the matter. Before the passing of the Married Women's Property Acts of 1870 and 1882 I do not doubt that a wife, setting up business in the way Mrs. Hancock has, would have done so as agent for her husband, for as long as coverture existed she could do so in no other capacity, and her acts would then constitute a breach of covenant by the husband, on the principle *qui facit per alium facit per se*. But this is not so now. The wife, although coverture exists, can nevertheless trade with her own separate property, apart from her husband and free from his control, as if she were a *feme sole*, as and when she pleases, and, if she does so, she is no more the agent for her husband than his father, uncle, or brother would be under like circumstances, nor can the husband restrain his wife from so acting. It is true that the proposition sounds novel, but, when looked into, the above is the real position of a wife in relation to

(A. L. SMITH, L.J.)

her husband at the present time in the circumstances of this case. If, therefore, it is desired to restrain such an act of a wife, the covenant of the husband must hereafter be so framed as to meet the case, for it is no part of the duty of the Court to place a forced construction upon the covenant, which it will not fairly bear, in order to put a stop to that of which it disapproves. When the agreement in this case was framed the capacity of the wife to do what she has done was not contemplated by the parties, for, if so, the covenant would obviously have been different. Counsel for the appellant contended that the guiding rule was that we should construe a covenant like the present so as to carry out the object and intention of the parties, and in this I agree, if he limited his proposition, which he did not, by the words "so far as the language of the covenant will fairly allow, but no further." Now the covenant is that the covenantor will not carry on, nor in any way be interested in, a business of a character similar to that sold, within the prescribed limits of time and place, which, in my judgment, means that he will not carry on, by himself or his agent, such a business, nor will he in anywise have any interest, be it pecuniary or personal, in such a business. It is not a covenant that he will not take an interest, whether from feelings of affection or friendship or what not, in how another may carry on his or her business within the prescribed limits. The words are "nor in anywise be interested in the business." To constitute a breach of the covenant it must be proved that the covenantor has some interest in the business itself which is being carried on, and not that he only takes, or has taken, an interest in the success of another carrying on his or her business. In my opinion this is the true reading of the covenant. If this case had rested here, for the reasons above stated, I should hold that the fact that the defendant's wife was carrying on a business as a *feme sole*, with her separate property on her own behalf, within the prescribed limits, did not establish a breach of covenant by the defendant. The husband takes no part whatever in the management of the business, and has advanced no money in that behalf. But it was said, and with truth, and this is an important part of the case, that the defendant before the business was started did not attempt to restrain his wife

from carrying it on, but actually aided and abetted her in so doing, by introducing her to his bankers, by going with her nephew to the wholesale merchants with whom the old firm dealt, and introducing him to them, and by taking part in the penmanship of the circular, which, it appears, was issued after the business was started, and in taking part in the issue of the same. I agree that this is evidence which might well lead to the inference that the business was in reality his, and not his wife's, or partly his and partly hers, which would suffice to constitute a breach of covenant by the husband, for he would then have an interest in the business. But, when this inference is disproved, as, in my judgment, it is in this case, how do the acts of the husband constitute a breach of the agreement sued on? He has no interest whatever in the business itself, which is that of his wife, carried on by her for her own purposes, though he has taken an interest in her succeeding therein, which these acts of his show that he has done. If the husband had performed similar acts in like circumstances for a stranger, who was setting up business on his own account, in my judgment it could not be said that he was in anywise interested in the business, though he had interested himself on behalf of the stranger, and so now the same result follows if he does the same acts for his wife. I agree that his conduct is such as to be highly disapproved of, but that does not constitute a breach of the agreement sued on. This agreement of March 21, 1886, does not cover the present case, and I cannot, though I should like to do so, hold that the husband has broken his agreement. I agree with Mr. Justice KEEKEWICH, and, consequently, I think that this appeal must be dismissed.

Appeal dismissed.

Solicitors: Cronin, Orgill & Cronin, for Llewellyn & Ackrill,
Tunstall, for the Appellant.

Chester & Co., for E. A. Paine, Hanley, for the
Respondent.

IN RE HERCYNIA COPPER CO. (LIMITED).
RICHARDSON'S CASE.

1894, April 30. LINDLEY, LOPES AND KAY, L.JJ.

Company—Winding-up—List of Contributories—Director's Qualification Shares—Implied Contract to take Shares.

Where a person has accepted the office of a director of a company there ought to be inferred an agreement on his part with the company that he will serve the company on the terms as to qualification and otherwise contained in the articles of association.

The articles of association named B. as one of the first directors, fixed the number of shares to be held as a qualification, and provided that the first directors should have power to act before acquiring this qualification, but in the event of their not acquiring it within one month of their appointment they should be deemed to have agreed to take the same, and the same should be allotted to them accordingly.

B.'s name appeared on the prospectus as a director, and he signed the articles, not as a signatory, but to show his assent to them. He never acted as director nor applied for any shares, nor were any ever allotted to him, and he was never registered as a member of the company:—

Held, that B. had agreed to become a director on the terms of the articles and must be settled on the list of contributories in respect of his qualification shares.

Isaacs' case (1) followed.

APPEAL from a decision of Wright, J. (2).

This was an application by one Richardson to have his name erased from the list of contributories in the winding-up of this company in regard to certain shares as to which the liquidator had inscribed his name on the list on the ground that he was a director liable for qualification shares.

By article 80, Richardson was named one of the first directors, and his name also appeared as a director on the prospectus of the company. He had signed the articles, not as a signatory, but to show his assent to them, and he had also signed the prospectus.

By article 84, the qualification of a director was to be the holding of shares to the nominal amount of 250*l.*, but the first directors were to have power to act before acquiring their qualification, but must acquire the same, in any event, within one month of their

(1) [1892] 2 Ch. 158; 61 L. J. Ch. 481; 66 L. T. 593; 40 W. R. 518.

(2) 63 L. J. Ch. 309; 70 L. T. 236.

appointment, and in the event of their not so acquiring it, they "shall be deemed to have agreed to take the same, and the same shall be allotted to them accordingly."

Richardson attended no meetings of the directors, nor did he act as a director in any way. On 21 July, 1891, however, the day of the incorporation of the company, he wrote to the engineer of the company a letter in which he referred to his appointment as director. Nothing further material transpired until 8 September, when he wrote to the secretary as follows:—"After careful consideration I find it impossible to attend to the duties of a director of your board. I am fearfully pressed with business, and Swansea being so far from town I cannot give the time. I therefore think it my duty reluctantly to resign, which resignation please place before my co-directors, and take any other proper steps. When I consented to join the board I was much freer, and could then, as matters stood, have acted, but matters have cropped up since which make it impossible."

The learned Judge on these facts held that Richardson had accepted the office of director, and was bound by article 84, and that his name must remain on the list of contributories.

Richardson appealed.

Gregson Ellis and Bingley, for the appellant:

There is evidence to show that the appellant only consented to become a director on the ground that the qualifying shares were allotted to him fully paid up. That was not done. The case is distinguishable from *In re Anglo-Austrian Printing and Publishing Union: Isaacs' case* (1). It is not enough to show consent by him to the articles unless it can also be shown that he consented to become a director on the terms of the articles.

Whinney, for the liquidator, was not called upon.

LINDLEY, L.J.: I think this is a clear case. The company was incorporated on 21 July, 1891, and on that date Richardson wrote to the engineer of the company and referred to his appointment as director. Subsequently he signed the articles and, I presume, assented to them. Having regard to articles 80 and 84, and to the

letters of the appellant of 21 July and 8 September, 1891, I cannot feel at liberty to draw any other inference than that he did assent to become a director on the terms of article 84. But then it is said that there was an agreement with some one that he was to have his qualification shares allotted to him fully paid up. That may be ground for an action against that person, but it is no answer to this claim of the liquidator. This case is to my mind quite as strong as *Isaacs' case* (1).

LOPES, L.J. : I also think this case is clear : [His Lordship stated the facts, and continued :] The fair inference is that Richardson agreed to become a director on the terms of the articles, and consequently agreed to take those shares which were necessary to qualify him as director. I do not feel any sympathy with persons who allow themselves to be held out as directors of a company, and get their qualifying shares for nothing, and then if the company turn out badly, want to be taken off the list. I think the decision in the Court below is right.

KAY, L.J. : I agree.

Appeal dismissed.

Solicitors : *J. J. G. Pugh*, for *G. J. L. Morgan*, Swansea, for the Appellant.

Slaughter & May, for the Respondent.

IN RE SECURITIES INSURANCE CO. (LIMITED).

1894, May 2. LINDLEY, LOPES AND KAY, L.JJ.

Appeal—Leave to Appeal—Order sanctioning Scheme of Arrangement—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 124—Joint Stock Companies Arrangement Act, 1870 (33 & 34 Vict. c. 104), ss. 2, 4.

A person who has not in any way been made a party cannot, even if bound or aggrieved by the order, appeal without leave against an order sanctioning a scheme of arrangement under the Joint Stock Companies Arrangement Act, 1870.

APPEAL from an order of Wright, J., sitting as an additional Judge of the Chancery Division.

On 7 February, 1894, WRIGHT, J., made an order sanctioning, under section 2 of the Joint Stock Companies Arrangement Act, 1870, a scheme of arrangement proposed by the liquidators of the Securities Insurance Co., Limited, of which Pearson & Co., the appellants, were creditors. The appellants did not appear on the hearing of the petition, but subsequently, considering themselves aggrieved by the order, they applied *ex parte* to the Court of Appeal for leave to appeal against such order. Leave was refused, and this appeal was then brought without leave.

Swinfen Eady, Q.C., and *Eve*, for the liquidators, took the preliminary objection that the appeal could not be brought without leave.

Farwell, Q.C., and *G. Lawrence*, for the appellants:

We can appeal without leave.

[KAY, L.J., referred to Buckley on the Companies Acts (6th ed., p. 314), where it is stated that “it would seem that . . . besides the official liquidator and the parties to the application in the Court below, any creditor or contributory of the company may appeal without leave obtained for the purpose.”]

The rule in the Annual Prac. 1894 (vol. i., p. 1013) applies only to cases where there are parties on the record, here there are none. Palmer's Company Precedents (5th ed., p. 858) says that “any creditor or contributory can appeal.”

It is usual for one or a few persons to appear on the petition, and others in the same interest consider that these sufficiently represent them; but, if the Court holds that we have lost our right to appeal by not appearing before WRIGHT, J., every person who would be affected by such an order must appear in the Court of First Instance, and great additional expense will be caused. If some of the persons interested hold back, the party who appears may have his claim settled when the petition comes on, and then the others will be told that they cannot appeal.

[LINDLEY, L.J., referred to *In re Cape Breton Co.* (1).]

We have really been served, and are parties. Advertisement is service, and a meeting under section 2 of the Act of 1870 takes the place of advertisement. Persons who do not appear are bound by the order made only because they are parties.

No section of any Act, and no rule, makes leave necessary in such a case as this.

[*Eady, Q.C.*, referred to *In re Markham, Markham v. Markham* (2), and *Watson v. Cave* (3).]

LOPES, L.J., referred to *In re Anglo-Californian Gold Mining Co.* (4).]

LINDLEY, L.J.: I think in this case our decision must be in favour of this preliminary objection. The case stands in this way. There is a petition presented by the liquidators for an arrangement under the Companies Act, 1862. A gentleman who might have appeared in Court on that petition did not do so. It seems doubtful whether he was present at the meeting held before the petition came on. If he was he did not vote. Now, without having been present on the hearing of the petition, he appeals, without leave, against the order made. He is not out of time in serving his notice of motion.

The Companies Arrangement Act, 1870, incorporates section 124 of the Companies Act, 1862, which runs thus: "Rehearings of and appeals from any order or decision made or given in the matter of the winding-up of a company by any Court having jurisdiction under

(1) 19 Ch. D. 77; 51 L. J. Ch. 202; 45 L. T. 395.

(2) 16 Ch. D. 1; 29 W. R. 228.

(3) 17 Ch. D. 19; 44 L. T. 40; 29 W. R. 433.

(4) 1 Dr. & Sm. 628; 31 L. J. Ch. 238.

this Act, may be had in the same manner and subject to the same conditions in and subject to which appeals may be had from any order or decision of the same Court in cases within its ordinary jurisdiction." Well, now, what is the practice about that; what was it before the Act of 1862, and what has it been since? I understand the practice is that a person who is a party can appeal without any leave at all, but a person who without being a party is bound by the order or aggrieved by it, cannot appeal without leave. It does not require much to get leave; if he can make out even a *prima facie* case he will get it. In this class of cases it appears to me that that practice ought not to be lightly departed from, because it would be most inconvenient if after a Judge had sanctioned a scheme, a person who did not take the trouble to attend could without leave come to the Court of Appeal with a notice of appeal. No doubt many persons would be willing to avail themselves of such an invitation, but we are not disposed to extend the invitation to them. It is fairly well settled—I think I am right in saying—that even in winding-up cases leave is necessary. I do not recollect a single appeal without leave, unless the appellant had been made a party in some way. I think this appeal must be dismissed.

LOPES, L.J.: I am of the same opinion. I am not familiar with the Chancery practice, but I think the old practice as stated by Lord Justice LINDLEY is the right one.

KAY, L.J.: I am of the same opinion, and I do not think I can usefully add anything to what has been said by Lord Justice LINDLEY. I think section 124 shows that the practice must be the same as the practice in cases of appeals within the ordinary jurisdiction of the Courts would be. When the Judge sanctioned the scheme the appellants were not present and did not oppose. They have not by any proceeding made themselves parties to this application; and, therefore, it is a case in which they cannot appeal without getting leave. It seems to me that this preliminary objection must succeed.

Appeal dismissed.

Solicitors: *Slaughter & May*, for the Appellants.

Gush, Phillips, Walters, & Williams, for the Respondents.

DREW v. GUY.

1894, May 4. LINDLEY, LOPES AND KAY, L.JJ.

Covenant—Restraint of Trade—"Similar"—Restaurant.

The business of one restaurant-keeper may be "similar," within the meaning of a restrictive covenant, to that carried on by another, though the establishment of the latter is a fully licensed public-house and the former has no licence of any sort at all.

APPEAL from a decision of Kekewich, J.

By an indenture dated 22 June, 1889, a messuage, shop and premises, being No. 327, Vauxhall Bridge Road, London, were demised by George Drew and Benjamin Wilkinson, the plaintiffs, to the Aërated Bread Company for a term of 28 years from 25 March, 1889, at an annual rent of 120*l.*, subsequently rising to 130*l.*

The lease contained a covenant by the lessees for themselves, their successors and assigns, with the lessors, their executors, administrators and assigns, not to carry on, or permit or suffer to be carried on, in or upon the demised premises or any part thereof, the trade or business of a keeper of a restaurant similar to that carried on by the tenant of the Windsor Castle public-house. The plaintiffs were the owners of the Windsor Castle, a fully licensed public-house, and had in January, 1887, demised those premises to one Raven.

In June, 1892, the lease of 327, Vauxhall Bridge Road was assigned by the Aërated Bread Company to the defendant, for 500*l.*

Prior to the assignment the Aërated Bread Company had carried on their customary business on the demised premises; such business was described in an affidavit of Susannah Mothersole, who had been for a considerable time prior to, and was at the time of, the assignment manageress at the company's depôt at 327, Vauxhall Bridge Road, and who stated that the following things were sold there: cold roast beef, ham, tongue, brawn, pressed beef, sausages, potted meat, hot and cold beef pies, veal and ham pies, eggs, cakes, pastry, jams, tartlets, scones, and other articles, together with

mineral waters of various kinds, tea, coffee and cocoa; and that, upon the defendant purchasing the lease, she remained with him for some time as manageress, selling for him the same articles, most of them being obtained from the Aërated Bread Company, as she had previously been selling for the Aërated Bread Company.

About October and November, 1893, the defendant added to the *menu* of the Aërated Bread Company some simple and inexpensive hot meat dishes at low prices, including chops, steaks, and soups. This being objected to by the plaintiffs, having regard to the clause in the covenant against keeping a restaurant similar to that of the "Windsor Castle" public-house, the defendant expressed his willingness to give up the sale of these additional articles, and on 4 January issued the following circular to his customers:

"CAFÉ RESTAURANT,
327, Vauxhall Bridge Road.

"Difficulties having arisen between the proprietor and the lessors owing to an obscure clause in the lease, the proprietor has been advised to discontinue for the present, and pending a legal settlement, the sale of chops, steaks, hot meats and entrées. He hopes, however, to substitute at lunch various vegetarian dishes, which he trusts may not prove unacceptable to his customers."

From that time he discontinued the supply of hot meats, chops, steaks, and soups, excepting hot beef pies as sold by the Aërated Bread Company, and substituted such vegetarian dishes as are usually sold at vegetarian restaurants.

The plaintiffs, not being satisfied, and requiring an unqualified undertaking from the defendant to limit his business so as to correspond entirely with that carried on by the Aërated Bread Company when in possession of 327, Vauxhall Bridge Road, issued a writ on 30 January, claiming an injunction to restrain the defendant and his agents from carrying on the trade or business of a keeper of a restaurant similar to that carried on by the tenant of the "Windsor Castle."

The "Windsor Castle" was a fully licensed public-house, with a high-class restaurant attached, being No. 331, Vauxhall Bridge

Road, and in the immediate neighbourhood of No. 927, Vauxhall Bridge Road, there being, in fact, only one house between Nos. 331 and 927. Both inside and out its appearance, style and management were of a kind much more ambitious than those of the defendant's establishment. The building was much larger, the proprietor supplied hot meats, game, poultry and soups, his charges were higher than the defendant's, and in the matter of table linen, plate, and service, his establishment showed further features of superiority over the defendant's restaurant. The average sum paid by the defendant's customers during the whole day was about sixpence a head, and during the hours of twelve and three, when they came in for their midday meal, about eightpence or ninepence a head, whereas the proprietor of the Windsor Castle supplied dinners costing a very much larger sum, and his luncheon customers might pay two shillings or half-a-crown for their midday meal. The tenant of the "Windsor Castle" was one Raven, who held under a lease by the plaintiffs, granted in January, 1887, for a term of years, he being debarred by his lease from carrying on certain businesses, and being only entitled to use the premises for the trade or business of a restaurant keeper, "a licence for such purpose having been previously obtained."

On 3 April KEKEWICH, J., being of opinion that there were great dissimilarities between the defendant's business as a restaurant keeper and that carried on by the tenant of the "Windsor Castle," especially in regard to the matter of the sale of alcoholic drinks and to the difference between the inexpensive meals supplied by the defendant and those supplied by the tenant of the "Windsor Castle," dismissed the action.

The plaintiffs appealed.

Warmington, Q.C., and *Dickinson*, for the appellants:

The defendant has infringed the covenant. "Similar" means here "so as to interfere and be injurious." The object was to prevent any competition beyond what would be the competition of the Aërated Bread Company, the original lessees, which was, of course, contemplated. The defendant's not selling alcoholic drinks is not sufficient to make his business dissimilar to that carried on

by Raven. He is carrying on the business of a keeper of a restaurant similar to that carried on by Raven.

[The COURT referred to *Fitz v. Iles* (1).]

Renshaw, Q.C., and *Bramwell Davis*, for the respondent :

The covenant was to protect the plaintiffs in respect of the carrying on of a public-house, of which business the selling of intoxicating liquors should be a part, and was not aimed at such a restaurant as the defendant's. You must look at the two establishments as a whole, and contrast them, and then you see they are quite dissimilar. It is not a breach of the covenant to sell some of the same things as the plaintiff: *Stuart v. Diplock* (2), *Lumley v. Metropolitan Railway Co.* (3). The defendant is unquestionably entitled to carry on a restaurant of some sort. It is a most important distinction that the defendant has no licence at all of any sort, neither a public-house licence nor a restaurant licence.

Dickinson, in reply :

Even selling such vegetarian articles of diet as are proposed would be an infringement.

LINDLEY, L.J.: This is an appeal from Mr. Justice KEKEWICH refusing to restrain by injunction the defendant from carrying on the trade or business of a keeper of a restaurant alleged to be similar to that carried on by the tenant of the Windsor Castle public-house, in contravention of a covenant, which provides that the lessees, their successors and assigns, "will not carry on, or permit or suffer to be carried on in or upon the demised premises, the trade or business of a keeper of a restaurant similar to that carried on by the tenant of the Windsor Castle public-house." Now it is conceded that the Aërated Bread Company might use the premises demised to them for the purposes of their business, and we have that business described in an affidavit of Susannah

(1) 2 R. 132; [1893] 1 Ch. 77; 62 L. J. Ch. 258; 68 L. T. 108.

(2) 43 Ch. D. 343; 59 L. J. Ch. 142; 62 L. T. 333; 38 W. R. 223.

(3) 34 L. T. 774.

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Mothersole, who was a manageress of the Aërated Bread Company before, and at the time when, the lease was assigned to the defendant. She states that, as such manageress, she sold for the company at 327, Vauxhall Bridge Road, cold roast beef, ham, tongue, brawn, pressed beef, sausages, potted meat, hot and cold beef pies, veal and ham pies, eggs, cakes, pastry, jams, tartlets, scones, and other articles, together with mineral waters of various kinds, tea, coffee and cocoa.

It is obvious that the Aërated Bread Company, having taken a lease of the premises, would be at liberty to sell these things there. This is not disputed, nor is it disputed that Guy, their assignee, might do the same. But what he says is that he may do more. What he may do is anything which is consistent with this covenant. He may carry on a restaurant, but he may not carry on a restaurant which is similar to that carried on by the tenant of the "Windsor Castle." The question, therefore, which we have to determine is, What is the meaning of "similarity" in this case? Now there are unquestionably considerable differences between the restaurant carried on by Raven and that which is carried on by the defendant. For one thing, Guy has no licence either for the purpose of selling alcoholic liquors or for the purpose of keeping his restaurant open after certain hours; he has no licence at all, whereas Raven has, and that constitutes a marked difference; but does that constitute a difference which prevents the two businesses from being similar? The answer depends upon the meaning of the word "similar," having regard to what it is which the covenant refers to. The similarity, if any, in my opinion, is that the defendant claims to carry on a business which will seriously compete with that of the plaintiff.

Then, is any restaurant, of which it can be said that its proprietor claims to carry on a business which will seriously compete with the restaurant of some one else, "similar" to that other restaurant? I cannot think that merely the difference of selling or not selling beer or wine, or the difference of the size of the houses, or the difference between having men waiters and women waiters, and the number of them, and all that, can be sufficient

to prevent the two businesses being similar within this prohibition. The thing we must look at must be what was in the contemplation of the parties when they entered into the covenant. I think it cannot be said that the defendant does not seriously compete with the plaintiff. It seems to me to be impossible to look at the case as it has been laid before us without seeing that Guy desires to carry on the business of a keeper of a restaurant as far as he can without a licence.

I think, therefore, the appeal must be allowed, but the order should be drawn so as to specify that the injunction is not to prevent the defendant from selling such things as are set out and described in Susannah Mothersole's affidavit. This will leave open the question, should it arise, as to whether or not the covenant applies to the selling of vegetarian articles, which seem to me to come very near the line.

LOPES, L.J.: I am of the same opinion. The terms of the covenant clearly allow restaurant keeping, but such restaurant keeping as is not similar to that carried on by the tenant of the Windsor Castle public-house. The first question then is, What does "similar" here mean? It seems to me that it means "similar so as to compete." Then if that be so, the next question is, Is the defendant carrying on a business so as to compete with that of Raven? It has been already pointed out by Lord Justice LINDLEY that there are certain very substantial elements of dissimilarity between Raven's business and that of the defendant. There is, for example, the fact that one has and the other has not a licence for selling alcoholic liquors, though I do not think that of itself is sufficient to constitute a dissimilarity for the purposes of this covenant; and there are other dissimilarities, such as the differences between the prices charged at the two establishments, though that again I do not think is sufficient.

But now, assume that the defendant does supply hot joints, and suppose a person desirous of obtaining a dinner; in such a case it is very likely that he would go to the establishment of the defendant and not to Raven's. The cheapness of the former would be an inducement. But the great thing to consider is the particular sort of dinner that might be wanted by such a person as I have

(LOPES, L.J.)

supposed. If he wanted a hot dinner, there would be no reason why he should not go to the defendant's establishment, whereas formerly he would have gone elsewhere. I am clearly of opinion that the defendant is not entitled to supply hot joints. As to whether or not he can, within the covenant, sell vegetarian dishes such as are proposed, that is a matter which is very near the line, and must be left to the discretion of the defendant. The appeal must be allowed according to the form of order which Lord Justice LINDLEY has explained.

KAY, L.J.: I concur.

Appeal allowed.

Solicitors: *Wilkinson & Son*, for the Appellants.

Timbrell & Deighton, for the Respondent.

IN RE LORD GERARD'S SETTLED ESTATES.

1893, July 18. LINDLEY, LOPES AND A. L. SMITH, L.JJ.

Settled Land—Mansion House—Rebuilding—Letting—Other Buildings—Chapel—Agent's House—"One Half of the Annual Income"—Settled Land Act, 1882 (45 & 46 Vict. c. 38), ss. 21 (iii.) (vii.), 25—Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 13 (ii.) (iv.).

The decisions on the Lands Clauses Act, 1845, that the purchase-money of settled lands, which ought by that Act to be reinvested in freehold lands, may be applied in building upon other parts of lands in settlement, have no application in the case of capital moneys under the Settled Land Acts. These statutes form a code and capital moneys can only be applied as the statutes direct.

Whether a building forms part of the principal mansion-house is a question of fact in each case.

A "rebuilding" of the principal mansion-house under the Acts is to be understood in connection with the structure, and does not include mere architectural embellishment.

Capital moneys cannot be applied in building a chapel or a house for the agent to the estate.

In re Houghton Estate (1) observed upon.

Section 13 (ii.) of the Act of 1890, only applies where the expenditure is to be made in view of an immediate or prospective letting.

In re De Teissier's Settled Estate (2) approved.

In ascertaining the half of the annual rental of the settled land for the purposes of section 13 (iv.), the rental of the whole of the land in settlement must be taken into account.

APPEAL from the decision of Chitty, J.

Lord Gerard, as tenant for life of the Eastwell Park Estate in Kent, took out a summons to obtain the sanction of the Court to the expenditure of capital moneys, in paying for the costs of certain building operations. The scheme submitted to the trustees stated these to be: i. To build two towers of stone at the north-east and south-east angles of the principal mansion-house to correspond with those at the north-west and south-west angles; ii. To remove the portico of the principal mansion-house, and to build an outer vestibule with a new portico in keeping with the style of the building; iii. To build an addition to the east wing to correspond with

(1) 30 Ch. D. 102; 55 L. J. Ch. 37; 53 L. T. 196; 33 W. R. 869.

(2) 3 R. 111; [1893] 1 Ch. 153; 62 L. J. Ch. 552; 68 L. T. 275; 41 W. R. 184.

that at the west wing; iv. To face the north front of the house with stone, and to introduce mullioned windows; v. To build a chapel; vi. To renew the stone copings and finials of the west wing; vii. To build new stables; viii. To build a residence for the agent to the estate. The trustees were willing to accede to Lord Gerard's wishes if the Court should be of opinion that they could do so consistently with their duty.

Mr. Justice CHITTY was of opinion that none of the proposed alterations could be provided for out of capital moneys under the Settled Land Acts.

Lord Gerard appealed.

During the argument the appellant's counsel abandoned the application except as regarded the stables and the agent's house.

E. W. Byrne, Q.C., and W. H. Upjohn, for the tenant for life:

The principal Act (3) speaks of the purchase of land in fee simple. Similar words occur in the Lands Clauses Consolidation Act, 1845, and have been held to authorize the expenditure of the purchase money of part of the settled land in building upon other parts of lands in settlement.

The agent's cottage falls within section 25 (x.) or (xi.) of the principal Act. Section 25 (x.) shows that the buildings need not be advantageous to the settled land: *In re Houghton Estate* (1).

The present stables are unsuitable. This will be a rebuilding within section 13 (iv.) of the Act of 1890. Lord Gerard may wish

(3) By the Settled Land Act, 1882, s. 21, it is enacted: "Capital money . . . shall, when received, be invested or otherwise applied wholly in one, or partly in one and partly in another or others of the following modes (namely) . . . (iii.) In payment for any improvement authorized by this Act . . . (vii.) In purchase of land in fee simple." And by s. 25: "Improvements authorized by this Act are the making or execution on, or in connection with, and for the benefit of settled land, of any of the following works . . . (x.) Cottages for labourers, farm-servants, and artisans, employed

on the settled land or not: (xi.) Farm-houses, offices and outbuildings, and other buildings for farm purposes."

By the Settled Land Act, 1890, s. 13, it is enacted: "Improvements authorized by the Act of 1882, shall include the following; namely . . .

(ii.) Making any additions to or alterations in buildings necessary and proper to enable the same to be let; . . . (iv.) The rebuilding of the principal mansion-house on the settled land: provided that the sum to be applied under this subsection shall not exceed one-half of the annual rental of the settled land."

to let the mansion-house, and no person would take the house with the present stabling. This brings the case within subsection ii. of the same section.

T. C. Wright, for the trustees.

LINDLEY, L.J. : The first question is the true mode of construing the Settled Land Acts. The appellant's counsel have contended that the principle of the decisions upon the Lands Clauses Consolidation Act, 1845, under which it has been held, as in *Drake v. Trefusis* (4), that money which has arisen from the sale of settled land to a railway company, and which is to be laid out in the purchase of other land, may be applied in the erection of buildings on land subject to the settlement, applied to the construction of subsection vii. of section 21 of the Settled Land Act, 1882; so that "land" would include the erection of buildings. The series of Settled Land Acts really form a code, and I think that it would be a mistake to apply to subsection vii. of section 21, the principle of construction which has been adopted with regard to another act, which has entirely other objects in view. Section 21 contains an enumeration of the purposes to which capital moneys may be applied, and, having regard to section 25, I cannot construe subsection vii. of section 21 as authorizing that which the Court has held could be done under the Lands Clauses Act. The line of cases under the latter Act are inconsistent with section 25 of the Act of 1882.

The Court must look at the Settled Land Acts alone, and see whether the proposed improvements are authorized by these Acts. I cannot find there anything which authorizes the expenditure of capital moneys in beautifying an ugly house. This remark applies to several of the proposed improvements. The same observation applies to the chapel. If the tenant for life wishes to have a chapel he must pay for it himself. The same observation applies also to the agent's house. But reliance was placed on the decision of Vice-Chancellor BACON in *In re Houghton's Estate* (1). I am inclined to think that in that case the house was a farmhouse in which the agent lived, and, if so, there would be no difficulty in allowing the

(4) L. R. 10 Ch. 364; 33 L. T. 85; 23 W. R. 762.

(LINDLEY, L.J.)

expenditure. If it were really a separate house for the agent, I do not think that the Vice-Chancellor's decision is in conformity with the Act.

As to the stables, the arguments which have been addressed to the Court are extremely ingenious, and like all ingenious arguments they require some consideration. Nothing is said about stables in the Acts, but it was said that the building of stables is authorized, not so much under the Act of 1882 as under section 13 of the Act of 1890, which has certainly enlarged section 25 of the Act of 1882. The building of stables might be authorized by subsection ii. of section 13 if they are necessary or proper to enable the same to be let. But when there is no question about letting I agree with the decision of Mr. Justice CHITTY in *In re de Teissier's Settled Estate* (2), and capital moneys cannot be expended for any of the purposes mentioned in subsection ii. Lord Gerard is not thinking of letting Eastwell House; on the contrary, he intends to live in it. Some prospect of letting the house, or some intention to let it, ought to be shown before any expenditure can be authorized under that subsection. Then subsection iv. of section 13 authorizes the expenditure of capital money in rebuilding the principal mansion-house on the settled land, and it was said that stables were part of the principal mansion-house, and that capital moneys, up to the statutory limit, may be expended in rebuilding them. Whether stables are or are not part of the principal mansion-house is a question of fact in each particular case. It may be that in the present case the old stables are so used for the purposes of the principal mansion-house and are so close to it, that they may be regarded as part of it. But can subsection iv. apply, when the pulling down of the old stables is merely to suit the fancy of the tenant for life? It is only an artistic fancy of the tenant for life, and cannot be regarded as a rebuilding of the principal mansion-house, even assuming that it could have been so regarded if the stables had become ruinous or had been burnt down. The decision of Mr. Justice CHITTY is quite right, and the appeal must be dismissed.

LOPES, L.J., concurred.

A. L. SMITH, L.J., in giving judgment to the same effect, said

that when subsection iv. of section 13 of the Act of 1890 spoke of half the annual rental of the settled land, he thought it meant the whole of the land which was subject to the settlement, and was not limited to the particular estate on which the house was situate.

LINDLEY and LOPES L.JJ., added that they did not differ from this view.

Appeal dismissed.

Solicitors: *Meynell & Pemberton.*

WEBB *v.* SHROPSHIRE RAILWAYS CO.
WHADCOAT *v.* SAME.

1893, June 20, 22, 23; July 27. LINDLEY, LOPES, AND A. L. SMITH, L.JJ.

Railway—Powers—Capital—Issuing Stock at a Discount—Issuing Debentures at a Discount—Agreement to Purchase its own Stock—Validity—Executory and Executed Contract—Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16).

A company governed by the provisions of the Companies Clauses Act, 1845, and amending Acts, may issue its stock as fully paid up at a price less than the nominal value, if the transaction is not in fact improvident.

The principle of *Campbell's case* (1) is applicable to such a company, which may, therefore, issue debentures at a price less than the nominal value, if the transaction is not in fact improvident.

APPEAL by the plaintiffs from the decision of Romer, J.

In 1866 two railway companies were amalgamated under the provisions of a private Act (29 & 30 Vict. ch. cci.), and the railway and undertaking thereby authorized became known as the Potteries, Shrewsbury & North Wales Railway Co. This company was not prosperous, and, in the year 1868, a scheme of arrangement was come to between it and its creditors, which was confirmed by the Court of Chancery on 9 May, and subsequently enrolled on 13 July of the same year. In 1874 an extension of the works was authorized by another private Act (37 & 38 Vict. ch. vi.). A

(1) 4 Ch. D. 470; 35 L. T. 900; 25 W. R. 299.

receiver was appointed, who received the tolls of the undertaking of the company, and who, for some years, maintained a small and inefficient service of trains. The running of the trains exhausted the whole of the tolls, and, as the state of the permanent way and bridges did not satisfy the requirements of the Board of Trade, the directors ordered the railway to be closed to public traffic on 22 June, 1880, and it so remained until the passing of the Act of 1881.

To meet this state of things, the Potteries Railway Co. obtained another private Act, the Potteries, Shrewsbury & North Wales Railway Winding-up Act, 1881 (44 & 45 Vict. ch. clviii.). This Act contained the following (among other) recitals :

“And whereas for some years the said receiver has been enabled to keep up a small, but inefficient, service of trains, only by devoting the whole of the said tolls and receipts of the company’s undertaking to the mere running expenses, and by neglecting the maintenance and repair of the permanent way and bridges, but having no funds to execute certain repairs deemed necessary by the Board of Trade for the safety of the public, the railway was, by order of the directors, closed to public traffic on June 22, 1880, and has since remained so ; and whereas the closing of the railway is the cause of great loss and inconvenience, not only to the neighbourhood immediately affected, but to the public generally, but the railway cannot be reopened for public traffic unless the company be freed from the weight of existing debts, liabilities, and encumbrances ; and whereas the shareholders of the company have no interest whatever in facilitating the reopening of the railway, as, under no conceivable circumstances, can receipts of the railway produce any dividend on their capital outlay ; and whereas it is expedient that the undertaking of the company be sold, and that their assets be distributed among the persons legally entitled thereto, and that the affairs of the company be wound up by the Chancery Division of the High Court of Justice, and that the company be dissolved.” The effect of the enacting part was shortly ; (section 3) that the company should be wound up under the provisions of Part IV. of the Companies Act, 1862, as amended by the Companies Act, 1867, notwithstanding the exception contained in section 199 of the Companies Act, 1862 ; (section 4) that the

liquidator should, in such manner as should be approved by the Court, offer the undertaking of the company for sale and should have power to sell the same to any railway company, with a proviso that the bid of any railway company should not be rejected on the ground of want of legal authority to purchase, but might be accepted subject to such railway company obtaining the necessary powers in the next session of Parliament; (section 5) that the transfer should be effected by deed; (section 6) that after the payment of the purchase-money and the execution of the conveyance the statutory duties of the company should cease; (section 7) that the statutory powers including the right to levy tolls should, after the payment of the purchase-money, be vested in the purchaser; and (section 8) that the purchase-money should be applied for the benefit of the debenture-holders, creditors and shareholders of the Potteries Railway Co. according to certain priorities and in specified proportions.

In April, 1882, the company was ordered to be wound up.

On 14 March, 1888, the liquidator, by a contract under seal, entered into a conditional agreement for the sale of the undertaking to the promoters of the Shropshire Railways Co. This deed provided (amongst other things): "(iii.) The liquidator shall sell, and the company shall purchase, the undertaking of the Potteries Co., on the terms and subject to the conditions hereinafter expressed; (iv.) The purchase-money to be paid by the new company to the liquidator shall be such a sum in money, or such an amount of fully paid-up stock in the Shrewsbury separate undertaking of the new company, as will satisfy all claims under subsections 1 and 2 of section 8 of the said Act of 1881, and, in addition thereto, such an amount of fully paid-up stock in the Shrewsbury separate undertaking of the new company as will enable the liquidator to pay in such stock, at the par value thereof, the maximum percentages mentioned in subsections 3, 4, 5, 6, and 7, of section 8, of the Act of 1881. (v.) The purchase is to be completed within six months of the passing of the Act, or such further time as the liquidator shall allow, and, upon payment of the purchase-money, the undertaking of the Potteries Co. shall vest in the new company, but the new company shall not be bound to see to the application, or be liable for the misapplication or non-application, of any part of the purchase-money."

The Shropshire Railways Act, 1888 (51 & 52 Vict. ch. xcii.) recited (among other things): "And whereas the liquidator has been unable to effect a sale of the undertaking of the Potteries Company for a sum of money, as contemplated by the Act of 1881, and the Potteries Railway has remained, and now is, closed for public traffic; and whereas an agreement (in this Act referred to as 'the scheduled agreement') between the liquidator of the one part, and certain persons therein named promoters of the bill for this Act of the other part, a copy of which agreement is set forth in the schedule to this Act, has been entered into for the sale to the company by this Act incorporated of the undertaking of the Potteries Company, upon the terms and subject to the conditions in the said agreement expressed, and it is expedient that the said agreement be confirmed, and provision made for carrying into effect the said terms and conditions; . . . and whereas the persons in this Act named, with others, are willing to acquire the undertaking of the Potteries Company upon and subject to the terms and conditions of the scheduled agreement, and to reopen the Potteries Railway for public traffic, if incorporated with the necessary powers for that purpose; and whereas it is expedient that the company to be incorporated (in this Act called 'the company') be empowered to construct the additional railways by this Act authorized, in extension of, or in connexion with, the Potteries Railway, and to abandon part of the Potteries Railway, which will be rendered unnecessary by the construction of certain of the railways by this Act authorized, and to acquire certain lands in this Act particularly mentioned." The Act accordingly incorporated the defendant company (section 4), and made the scheduled agreement binding on it (section 5), but the liquidator was empowered to accept fully paid-up stock in the new company, instead of cash as under the Act of 1881; but costs and expenses of obtaining land were not to be paid in stock, unless the payees were content to take it instead of cash (section 5). For financial purposes the new company's undertaking was divided into two—viz., "the Shrewsbury Separate Undertaking," and "the Market Drayton Separate Undertaking" (sections 14 and 15). The capital of the former was not to exceed 350,000*l.*, consisting of fully paid-up stock to such nominal amount, not exceeding the above sum, as might be necessary or convenient for the company

to create and issue for the purposes of and in accordance with the scheduled agreement (section 15). In addition, however, to this fully paid-up stock, the company was empowered to borrow, on mortgage of the Shrewsbury Separate Undertaking, any sum not exceeding 100,000*l.*, when and so soon as the Potteries Railway should have been transferred to and vested in the company under the provisions of this Act and of the Act of 1881 (section 27); and debenture stock might be issued instead of mortgages (section 30). Section 31 provided that "All moneys raised under this Act, whether by shares in or by debenture stock or mortgages of either separate undertaking of the company, shall be applied only for the purposes of that undertaking, being in all cases purposes to which capital is properly applicable. That is to say—(A) Money raised by debenture stock or mortgages charged upon the Shrewsbury Separate Undertaking shall be applied only in payment of the purchase-money or consideration for, and the expenses of, the purchase of the Potteries Railway, and in putting so much of that railway as shall not be abandoned under this Act into efficient and complete working order, fit for passenger and goods traffic, and in purchasing lands for the purposes of that separate undertaking, and constructing the railways and portion of railway by this Act declared to be part of that separate undertaking, and in providing rolling and working stock and plant for that separate undertaking, and in payment of the costs, charges, and expenses of applying for, obtaining, and passing this Act . . . and otherwise for purposes of the Shrewsbury separate undertaking."

In 1890 the Shropshire Railways Co. entered into three agreements, of a financial character, with Whadcoat Brothers (Limited), who were bankers. By the first of these, which was dated 3 June, 1890, the bankers were to pay to the company 79,500*l.*, 20,000*l.* of which must be in stock of the company, and in consideration of this advance the company was to pay to the bankers 173,200*l.* in debentures and fully paid-up stock. As to 90,200*l.*, this was to be satisfied in debentures to be issued under the Act of 1888, and the remaining 53,000*l.* was to be provided in fully paid-up stock, and 30,000*l.* in other debentures, for leave to create which application was to be made to Parliament. If the necessary authority could not be obtained, cash was to be paid instead. By the second,

which was dated 1 August, 1890, 5,000*l.* in debentures and 5,000*l.* stock were to be paid to the bankers in consideration of their paying 5,000*l.* earlier than they had agreed to do, and not as against the engineer's certificates, as previously agreed. By the third, which was dated 10 December, 1890, the agreement of 3 June was further modified, the bankers agreed to accelerate their payments on terms which substantially amounted to an acceleration of payment by the railway company of 20,000*l.* capital stock, which was to be provided under the original agreement, and, in addition, the bankers were to receive a proportionate increase in the number of debentures to be issued to them if the necessary powers could be obtained.

By the Shropshire Railways Act, 1891 (54 & 55 Vict. ch. cxi.), power was given to issue further stock and debentures.

The action was brought by holders of stock in the Shropshire Railways Co. for a declaration that the agreements between the company and Whadcoat Brothers & Co. (Limited) were void as being *ultra vires* the railway company, and for the cancellation of the stock and debentures issued in pursuance thereof to Whadcoat Brothers & Co. (Limited), or its officers, and for ancillary relief.

It appeared from the evidence that the liquidator of the Potteries Railway Co., before he would convey the undertaking to the defendant railway company, required 4,000*l.* cash as security for outstanding claims. This he regarded as the equivalent of 5,000*l.* debentures and 5,000*l.* capital stock previously deposited with him. It was also in evidence that the 20,000*l.* stock, which by the terms of the agreement of 3 June, 1891, the bankers were to transfer to the company, had been in fact applied in part satisfaction of the moneys due to the contractor employed on the works. Mr. Justice ROMER held that the transaction was not in fact improvident; that the agreements were not *ultra vires*; and that the substance of the agreement with respect to the 20,000*l.* stock was to be looked at, and that it did not amount to a purchase by the company of its own stock.

Sir H. Davey, Q.C., Buckley, Q.C., and Dunham, for the appellants.

Sir J. Rigby, S.-G., Neville, Q.C., and A. R. Kirby, for the respondent Whadcoat Brothers (Limited).

Chadwick Healey, Q.C., and G. P. Macdonnell, for the respondent railway company.

Cur. adv. vult.

July 27.

The written judgment of the Court was delivered by

LINDLEY, L.J., as follows: This is an appeal by the plaintiffs, holders of stock in the Shropshire Railways Co., against a decision of Mr. Justice ROMER, and the question raised by the appeal is whether certain agreements entered into by the defendants in June, August, and December, 1890, and relating to the construction or completion of certain railways, ought to be set aside, on the ground that those agreements are not warranted by the Shropshire Railways Act, 1888.

A company called the Potteries, Shrewsbury, and North Wales Railway Co., or, more shortly, the Potteries Company, was formed in 1866, by a special Act, out of two previously existing companies, which were then dissolved. Their undertakings were united into one undertaking, which became the undertaking of the new company. The undertaking consisted of certain railways and works authorised by various Acts of Parliament and situate in the neighbourhood of Shrewsbury. The company thus formed was not prosperous. In 1868 a scheme of arrangement between the company and its creditors was entered into. In 1874 an extension of the company's railway was authorized. A receiver was in receipt of the tolls of the undertaking, but no interest was ever paid on the company's debenture stocks. The railway could only be kept going by neglecting necessary repairs, and in June, 1880, it was closed to public traffic.

In 1881 an Act was passed for winding up the company. This Act, after reciting the history of the company and the state it was in, further recited as follows: [His Lordship read the recitals above set out, and continued:] The Act then provided for winding up the Potteries Company (section 3), and authorized the liquidator to sell the undertaking to any railway company (section 4); and, upon

payment of the purchase-money and execution of a proper conveyance, the undertaking of the company was to be vested in the purchaser, subject to the obligations of the company with respect to the maintenance and use of the railway, but discharged from all the other obligations of the company, except those incurred for land (section 6). The purchase-money to be paid to the liquidator was to be applied by him in the manner prescribed by section 8, which was shortly this—viz. (a) and (b) in payment of costs and expenses for completing purchases of land; (c), (d), (e), and (f), in paying, according to a scale, the debenture-holders and other creditors of the company; and lastly, (g), and (h), in paying something to the shareholders. It is impossible to read this Act without seeing that one of its main objects was to have the railway reopened for traffic, and for that purpose to have it put and kept in a proper state of repair.

In April, 1882, the company was ordered to be wound up, and in March, 1888, an agreement for the sale of the undertaking to the promoters of the Shropshire Railways Co. was entered into. This agreement is set out in the schedule to the Shropshire Railways Act, 1888, to which it is necessary to refer at some length. Before doing so I will point out that the agreement for sale entered into by the liquidator could not be carried out without further statutory authority, because the railway company, who were to purchase the undertaking of the Potteries Company, which its liquidator was empowered to sell, had not been itself created, and did not in fact exist.

The Shropshire Railways Act, 1888, refers again to the state of the Potteries Company; to the closing of its railways and branches in 1880; and to the Act of 1881 and the proceedings under it, and then follow recitals, which I will read. [This his Lordship did, and continued:] Here, again, we find the reopening of the Potteries Railway for public traffic one of the main objects sought to be obtained by the Legislature. The means of obtaining this end were the formation of a company to carry out the scheduled agreement. [His Lordship then shortly stated the effect of the Act down to the end of section 30 as above set out, and continued:] So far the funds at the disposal of the company, for the purposes which have to be considered in the present case, are (a) 350,000*l.*

fully paid-up stock, and (b) 100,000*l.* debentures or debenture stock; but there is nothing in the Act relating to the rate of interest or dividends which these funds may bear, nor to the price at which they may be issued. Nor, so far, is there anything in the Act to preclude the company from raising money by whichever mode is most convenient, nor anything to prevent the company from applying the money raised in any way they think proper, provided they apply it only for the purposes of the Shrewsbury separate undertaking, and that alone. But section 31 goes on to say how these moneys are to be applied. [His Lordship read the section.]

Now, it will be observed that, although the Act says that the money raised by debenture stock or mortgage shall be applied only in the making of certain payments, there is no restriction on the application of the capital stock, except that it must be confined to the purposes of the Shrewsbury separate undertaking. Moreover, even as regards the debenture stock or mortgages, the general words at the end of section 31, clause A, authorize the company to apply money borrowed, not only for the purposes previously specified, but also "otherwise for the purpose of the Shrewsbury separate undertaking."

The only other provisions relating to this subject are to be found in clauses 4 and 5 of the agreement in the schedule. [To which his Lordship referred.]

The appellants contend that under these Acts and the agreement the company have no power to raise money by the sale of fully paid-up capital stock of the company, or, at all events, no power to issue such capital for less than its full nominal value, and no power to pay for completing their railways and putting them into proper repair and condition by means of the capital stock. It is further contended that the company cannot issue debenture stock or mortgages for less than their nominal value, or, at all events, without fixing its price. We are unable to adopt any of these conclusions.

As regards the fully paid-up stock, there is no principle or authority for saying that a company governed by the Companies Clauses Consolidation Act, 1845, and the Acts amending it, cannot issue fully paid-up stock for what they can get for it. Fully

paid-up stock is very different from shares liable to calls. Whether shares in companies governed by the Companies Clauses Consolidation Act, and liable to calls, can be issued at a discount need not be discussed on the present occasion. But the holders of stock issued as fully paid-up under statutory powers are under no liability to creditors, and can have no calls made upon them. The Companies Acts, 1862 to 1867, have no application either to companies governed by the Companies Clauses Consolidation Act, 1845, or to fully paid-up stock issued under the provisions of the special Act incorporating it. There is nothing in law to prevent a company from issuing such stock for cash, or in payment for land bought or materials provided, or for work and labour, or in payment of services; nothing *ultra vires* in an agreement by the company to pay for such things in fully paid-up stock, taken at such a price as the company and those dealing with them can agree upon. Whether directors can in any particular case be made personally responsible for wasting the assets of the company, by issuing fully paid-up stock for less than its market value, is a very different matter.

Similar observations apply to the issue of debentures or mortgages, and, notwithstanding the distinction attempted to be drawn between borrowing money on mortgage and raising money on mortgage, we can find nothing in this Act of 1888 which introduces any restriction on the power given to raise money for the purposes of the Act, by creating and issuing mortgages or debenture stock. The authorities which show that debentures can be issued at a discount, *e.g. Campbell's case* (1), are, in our opinion, as applicable to this company as to companies governed by the Companies Act, 1862, to which those decisions more particularly relate.

Of course, if the special Act of 1888 had prohibited the issue of the fully paid-up capital for any particular purpose, the company could not lawfully issue it for that purpose. But we can find no prohibition against the issue of paid-up capital for any purpose of the Shrewsbury separate undertaking. It would be to impose upon the company a restriction not to be found in the Act, and in the result to defeat one of the main objects of the Act, if we were to hold that the company could not issue its fully paid-up capital for the purpose, amongst other things, of doing what might be necessary

for re-opening the Potteries Railway to public traffic. This conclusion really disposes of this appeal.

The agreements sought to be set aside cannot be held *ultra vires* the company, if the Act of 1888 is construed, as we are of opinion it ought to be construed, not narrowly, as contended by the appellants, but fairly with reference to its declared objects, and if the law relating to the issue of fully paid-up stock and of mortgages or debenture stock is what we have stated it to be. We forbear, therefore, to examine those agreements in detail. [His Lordship stated the short effect of these three agreements, and continued :] It is obvious from these agreements, that the payments to be made by the railway company to the bankers, in capital stock and debentures, were calculated upon the footing that the capital stock and debentures were worth very much less than their nominal value. We were told that they were issued at a discount of something like 60 per cent. Onerous, however, as these terms apparently were, we have no reason to doubt that they were the best terms which could be made under the circumstances, and under the difficulties with which the company had to grapple. On this part of the case we cannot usefully add anything to the observations of Mr. Justice ROMER.

A point was made that the company agreed first to sell and then to repurchase 20,000*l.* of its own stock, which it was urged was plainly *ultra vires*. The answer, however, is that no such purchase was really contemplated, nor has the company, in fact, purchased its own shares. The 20,000*l.* stock has gone to the contractor through the bankers. Even if the agreement as to the 20,000*l.* had been to the effect suggested, so that the agreement might have been set aside on this ground before it had been acted upon, yet if, in point of fact, the agreement has been carried out without any purchase by the company of its own stock, the Court could not afterwards usefully or properly interfere. The attack on the agreements, so far as it is based on this ground, would be too late, even if it might have succeeded earlier. By means of these agreements the company has, in fact, purchased and acquired the undertaking of the Potteries Company, and has put the railways of that company into good working order, and has constructed part of the new railway authorized by the Act of 1888.

In 1891 the company obtained further powers by another Act, reciting what had been done under the Act of 1888. It is true that this Act of 1891 does not refer to the impeached agreements, and cannot be relied on as confirming them. It would, however, be extremely difficult, if not impossible, to set aside those agreements now on any terms which would be just and equitable. But assuming that this difficulty could be surmounted, and apart altogether from it, we have come to the conclusion that the agreements were not *ultra vires*, and the appeal must be dismissed with costs.

Appeal dismissed.

Solicitors : *Tarry, Sherlock & King*, for the Appellants.

Bircham & Co., and *Stretton, Hilliard, Dale & Newman*,
for the Respondents.



IVES & BARKER v. WILLANS.

1894, April 23, 24. LINDLEY, LOPES, AND KAY, L.JJ.

Practice—Arbitration—Action—“Step in the Proceedings”—Requiring statement of Claim—Unfitness of Arbitrators—Bias—Misconduct—Some of the matters in dispute not within the submission—Discretion of the Court—Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 4.

A notice in writing, under R.S.C., Order XX. r. 1 (b), requiring a statement of claim, is not a “step in the proceedings” within section 4 of the Arbitration Act, 1889, so as to preclude a defendant from afterwards applying under that statute to stay proceedings in the action.

Semble, “a step in the proceedings” means some application to the Court and not verbal or written communications between the solicitors of the parties.

Where by a contract the engineers of a certain railway company are made arbitrators in all disputes, the fact that the engineers have in their capacity of engineers had before them and formed an opinion upon some or all of the questions which as arbitrators they will have to consider, is not a “sufficient reason why the matter should not be referred in accordance with the submission,” within section 4 of the Arbitration Act, 1889. Proceedings will therefore be stayed under that section unless it can be shown that the engineers have been or are likely to be guilty of fraud or misconduct.

When some of the matters of difference arising under a certain contract are, but others are not, within an agreement to refer to arbitration, it is a question in the discretion of the Court where those matters to which the submission applies should be referred, the action being left to proceed as to the remainder. One consideration to which the Court will attach weight is the comparative importance of the matters within the submission and of those outside it.

APPEALS from Kekewich, J.

On 22 July, 1889, the Liverpool Overhead Railway entered into an agreement with the defendant Willans for the construction of their railway. Clause 4 of the agreement provided that the work should be executed to the satisfaction of the company's engineers; and clause 37 provided that if any question, difference, or dispute arose between the company and the defendant Willans touching any matter under the contract, it should be referred to the same engineers, whose decision should be “final and conclusive.”

The defendant Willans entered into several sub-contracts with different persons, and amongst others with the plaintiffs, for the making or putting together of the materials he required. The

plaintiff's sub-contract, which was dated 24 August, 1889, contained provisions (clauses 3 and 9) incorporating clauses 4 and 37 of the contract of 22 July, 1889.

Disputes having arisen under the sub-contract, the plaintiffs on 1 July, 1893, issued a writ in an action for (*inter alia*) damages for breach of contract against the defendant Willans (then the sole defendant), whose solicitors on entering an appearance, and also by a letter subsequently written, asked under R.S.C., Order XX. r. 1 (c), for a statement of claim.

On 20 July, 1893, the defendant Willans took out a summons under section 4 of the Arbitration Act, 1889, to stay proceedings in the action. The plaintiffs opposed this on the grounds that the defendant, by asking for a statement of claim, had taken a "step in the proceedings" within that section; and that the engineers had shown by their conduct that they were not proper persons to act as arbitrators.

On 3 November, 1893, and 28 February, 1894, Mr. Justice KEKEWICH made orders staying all proceedings except as to a claim in respect of the removal of certain materials known as "decking" (1). The plaintiffs appealed against both orders.

Renshaw, Q.C., and *A. F. Peterson*, for the appellants:

A letter requiring a statement of claim is "a step in the proceedings."

[LOPES, L.J.: Does not taking a step in the proceedings mean doing something inconsistent with the arbitration?]

Without such a demand the plaintiffs could not have safely delivered a statement of claim: Order XX. r. 1, subs. (e). The defendant must show that he is and has always been ready and willing to proceed with the arbitration: Arbitration Act, 1889, section 4.

They also referred to the Annual Practice, 1894, vol i. p. 497, and *Adams v. Cattley* (2).

(1) [1894] 1 Ch. 68; 63 L. J. Ch. 78; 69 L. T. 710; 42 W. R. 396.

(2) 66 L. T. 687; 40 W. R. 570.

[KAY, L.J., referred to *Chappell v. North* (3), where an application for leave to administer interrogatories was held to be a step in the proceedings.]

Secondly, we say that the arbitrators have by their conduct rendered themselves improper persons to be judges: *Jackson v. Barry Railway* (4), *Nuttall v. Mayor of Manchester* (5). *Eckersley v. Mersey Docks and Harbour Board* (6) practically decides that *Lawson v. Wallasey Local Board* (7) was wrong.

Thirdly, one matter in dispute under this contract, as to the "decking," is not within the submission, and therefore the Court in its discretion under section 4 will not direct a reference: *Turnock v. Sartoris* (8).

Warmington, Q.C., and *Bramwell Davis*, for the respondents :

[LINDLEY, L.J.: We need not trouble you as to the question whether the application was too late.]

In *Turnock v. Sartoris* (8) the main part of the dispute could not be referred. Here what cannot be referred is a very small part, if anything. As to the conduct of the engineers, the plaintiff's evidence is all contradicted and is very vague. Collusion is suggested, but not proved. By the principal contract the work was to be done to the satisfaction of the persons who are named as arbitrators. The work is sub-let to sub-contractors, and they agree to do it to the satisfaction of the same individual. That is the only safe arrangement for the original contractor. The parties, when they entered into these contracts, contemplated and intended that the engineers should be in the position to which the plaintiffs now object.

Renshaw, Q.C., in reply :

Evidence of fraud on the arbitrators' part is not necessary.

(3) [1891] 2 Q. B. 252; 60 L. J. Q. B. 554; 65 L. T. 23; 40 W. R. 16.

(4) 2 R. 207; [1893] 1 Ch. 238; 68 L. T. 472.

(5) 8 Times L. R. 513.

(6) 9 R. 827; [1894] 2 Q. B. 667; 71 L. T. 308.

(7) 11 Q. B. D. 229; 52 L. J. Q. B. 302; 48 L. T. 507.

(8) 43 Ch. D. 150; 62 L. T. 209; 38 W. R. 340

[LINDLEY, L.J.: I think you must show misconduct.]

Gross negligence is enough.

LINDLEY, L.J.: This is an appeal from an order of Mr. Justice KEKEWICH staying proceedings in this action of Ives against Willans, and in fact in substance referring the matter in dispute to arbitration. The order he made was made under section 4 of the Arbitration Act, 1889. The application was by the defendant. The appeal is by the plaintiffs, and their grounds for appeal are reducible to three. First of all they say that the application to stay was too late, because the defendants had taken a step in the action. Their other grounds of complaint go more to the merits of the case. They attack the fairness of the arbitrators. Their third point is this, that inasmuch as the whole action is not and cannot be referred to arbitration, no part of it ought to be referred by the Court in the exercise of its discretion. I will read section 4 of the Arbitration Act. It runs thus: "If any party to a submission . . . commences any legal proceedings in any Court against any other party to the submission . . . in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that Court to stay the proceedings, and that Court or a Judge thereof if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings." As to the first point about the application being too late, the facts are these. The plaintiffs issued their writs against the defendants. The defendants entered an appearance, and by the præcipe they required a statement of claim. They also wrote a letter to the plaintiffs' solicitor saying that they desired a statement of claim. They took no other step—if these are steps. The plaintiffs say that the defendants were too late, because they had asked for, or given notice that they should require, a statement of claim. That is said to be "taking a step in the proceedings." The language of the section requires a little attention. It is quite obvious that the "step" must be a step taken by the

applicant. He must apply "before delivering," that is, before he delivers, any pleadings, or takes any other step. The question we have to consider, therefore, is whether a request by one party to another to take a step is "taking a step." I cannot see that the defendants have taken any step in these proceedings; and I do not think it would be good sense if we held the contrary. What did the defendant do? He had the writ, and the writ showed simply that there was a claim for breach of contract. He did not know what the particular breaches were in respect of which the plaintiffs sued him; and until he knew that much, at all events, how was he to form any opinion as to whether it would be desirable to apply to refer? I think we should be doing an injustice if we said to the defendant, "You must apply to refer before you know what the plaintiff is suing you for." I do not think this is within the spirit or the sense of the enactment. I have no doubt that the decision of the learned Judge was right. I do not refer to the authorities. I think they go rather to this, that a "step" means some application to the Court, not a talk between solicitors or their clerks, nor letters written by the solicitors.

Now I pass to the next point, which goes to the merits of the case. It is an attack on the conduct of these arbitrators. It is of the utmost importance that we should see what is the agreement between the parties. The agreement is comprised in the sub-contract of 24 August, 1889, made between Willans and Ives and Barker, which refers to a contract between the Liverpool Overhead Railway Co. and Willans, which I may call the principal contract. It is impossible to understand the sub-contract without referring to the principal contract. The principal contract is for the construction of the Liverpool Overhead Railway. By it Willans contracted to make the overhead railway. [The Lord Justice read clauses 4 and 37 of the agreement of 22 July, 1889, and continued:] That is a very tight-fitting bond; and one is surprised, at first sight, that any contractor should submit to be bound so tightly, because we know perfectly well that a dispute between the contractor and the company is really a dispute between the contractor and the engineer. What is the business explanation of that? How is it that a man will agree to be bound by such a very stringent condition as that? The explanation is, I think, to be found in two circumstances. First of

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all, the competition for such contracts as this is very keen. Secondly, it has been ascertained by experience that engineers of the highest character may be trusted to deal fairly in such a case, and the contractor knows his man. I take it a contractor would not agree to be bound by a clause of that kind unless he had confidence in the engineers. The sub-contract arises in this way. Willans agreed to make these works. He found it necessary to enter into sub-contracts with certain persons, with some of them to make, and with others to put together the things he required. The sub-contract in each case refers to the original contract. [The Lord Justice read clauses 3 and 9 of the agreement of 24 August, 1889, and continued:] Let us consider what that agreement really amounts to. What is it that the contractors, or rather the sub-contractors agreed to when they signed that sub-contract? They agreed to be bound in all disputes between them and Willans by the decisions of the engineers of the company. They knew what the duties of those engineers were, and that amongst them was to pass or reject materials. They agreed to put up with such materials as were supplied, and to submit to the engineers any difference, though it really becomes indirectly a difference between them and the engineers. That is the substance of the bargain. Now, if that is so, what must the sub-contractor prove in order to make out that in a dispute between them and Mr. Willans the contractor, these engineers and arbitrators are improper persons to decide? They must prove a great deal more than that the engineers have formed an opinion already on the subject in dispute. They must attack the character of the engineers in such a manner as to show that the engineers will probably be guilty of some misconduct; that they probably will not act fairly. They cannot complain of the legitimate consequences of their own agreement. If it were true that these engineers were in collusion with either party so as to act unfairly, there would be some ground for saying that this clause ought not to be enforced. It appears to me, having heard the evidence, that there is really no evidence on that subject which deserves serious attention. [The Lord Justice examined the evidence, and continued:] The sub-contractors must go far beyond that to satisfy the Court that these

engineers are men not to be trusted. That part of the case seems to me to break down entirely.

The plaintiffs' third point is this. It is said the language of the section only gives the Court power to stay proceedings "if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission;" and inasmuch as you cannot refer the whole controversy, it is not right and proper, or convenient, to refer at all. In support of that contention the case of *Turnock v. Sartoris* (8) was cited. Now, if the matter agreed to be referred were mixed up with matters not agreed to be referred, or if the matters not agreed to be referred were the main matters in dispute, it would be inconvenient to refer. But the great controversy here is as to matters which have been agreed to be referred, and the only matter not so agreed—that of the "decking"—is comparatively small.

I have, therefore, come to the conclusion that the decision of the learned Judge was quite right, and that the appeal should be dismissed.

LOPES, L.J.: I am of the same opinion. The first point is that this application is too late. Under section 4 of the Arbitration Act, the real question raised is this, whether asking for a statement of claim is a "step in the proceedings" within the meaning of that section. I am clearly of opinion that it is not. The writ is for breach of contract. The defendant entered an appearance, and then endorsed this request for a statement of claim. He may say, "Here is a submission in respect of certain matters agreed to be referred: I cannot tell how much of the claim in this writ comes within that agreement." He therefore applies for a statement of claim in order to ascertain for himself what is within the submission and what is not; in order that when he knows that he may elect as to what he shall do; whether he shall do that which would be a step in the action, or whether he shall forbear. I do not think an application of that kind is a "step in the proceedings" within the meaning of this section.

Another part of the case is this. It is said that the engineers are not to be trusted, and that the arbitrators cannot safely proceed with them as judges. These engineers are not arbitrators in the ordinary sense. They are arbitrators chosen and selected before-

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hand by the parties themselves, selected for their special knowledge of the matter. I think the words of Lord Justice BOWEN in the case of *Jackson v. Barry Railway* (4) are highly instructive as to what the position of engineers who are arbitrators is in a case like the present. He says: "It is an essential feature in the contract between the plaintiff and the railway company, that a dispute such as that which has arisen between the plaintiff and the company's engineer, should be finally decided, not by a stranger or a wholly unbiassed person, but by the company's engineer himself. Technically, the controversy is one between the plaintiff and the railway company; but, virtually, the engineer, on such an occasion, must be the judge, so to speak, in his own quarrel. . . . It is no part of our duty to approach such curiously-coloured contracts with a desire to upset them, or to emancipate the contractor from the burden of a stipulation which, however onerous, it was worth his while to agree to bear. To do so, would be to attempt to dictate to the commercial world the conditions under which it should carry on its business. To an adjudication in such a peculiar reference, the engineer cannot be expected, nor was it intended, that he should come with a mind free from the human weakness of a preconceived opinion. The perfectly open judgment, the absence of all previously-formed or pronounced views, which, in an ordinary arbitrator, are natural and to be looked for, neither party to the contract proposed to exact from the arbitrator of their choice. They knew well that he possibly or probably must be committed to a prior view of his own, and that he might not be impartial in the ordinary sense of the word. What they relied on was his professional honour, his position, his intelligence." Every word I have read from that judgment appears to me to apply to the present case. There are two main complaints against the arbitrators. One is, that they have prejudged a certain question with regard to the quality and fitness of certain material. The answer is, that the parties perfectly well knew when they consented that these engineers should be the arbitrators, that difficulties such as these might arise. Knowing that, they have agreed that their differences should be submitted to them. They have agreed to be bound by the engineers' decision, provided it was honest and not tainted with

fraud or misconduct. As far as I can collect, it cannot be suggested that they acted fraudulently. If a case of this kind could be made out, "You the engineers, perfectly well knowing that the materials were unfit, yet passed them;" that would have been strong ground for making this application. But there is no such thing. In my opinion, the evidence on this point is no ground whatever for stopping the arbitration.

Another ground alleged is that the arbitrators are improper because a question of their own skill and competency may be involved in the submission. I think that is disposed of by the *Mersey Docks case* (6). Another attack made on the arbitrators is on the ground of collusion. All I can say with regard to that is, that the charge is so wide and so vague, and that in respect of it there is so little that is specific, that I decline to give effect to it. In my opinion, therefore, the decision of the learned Judge is right.

KAY, L.J.: I also agree with the decision of the learned Judge, and I agree entirely with the judgments pronounced in this Court, and particularly with the elaborate judgment of Lord Justice LINDLEY. I should say nothing further, except that the case involves certain very important questions.

As to the first point, whether requiring a statement of claim is taking a step in the action, I am very clearly of opinion that it is not, and for these reasons: When a writ has been issued, it may very well be that the defendant who is sued may not completely understand from the writ what the scope of the action is. *Mr. Renshaw's* argument is that the defendant has to exercise an election whether he will allow the action to go on, or avail himself of the arbitration clause. But it is essential to every election that a man shall understand the facts which make it necessary to elect. In this case, what the defendant did was to require a statement of claim to be delivered. But he did not wait until the statement of claim was delivered: he withdrew his request, and then gave notice of this application to stay proceedings. He applied to stay all proceedings, but when the scope of the action became apparent it was found that he had gone too far, and included in his motion to stay a part of the action which referred to a matter outside the agreement containing the clause of arbitration. Nothing could

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show more clearly how improper it would be to say that requiring a statement of claim which should show what the scope of the action was, would be the taking by him who made that requisition of such a step in the action as to debar him from making his election to refer. I think the learned Judge was entirely right on this point.

The other points are of vastly more importance. It seems to be a custom, now I suppose inveterate, that in large contracts of this kind the engineers employed, on behalf of the company undertaking the work, to watch the contractors, should be named as the arbitrators between their employers and the contractors if a dispute should arise. One can see, and the course of decision of late years in this Court has shown, that that must lead to questions of difficulty between the parties. To make the engineers employed by the persons who engage the contractors, arbitrators on every question, must put those engineers sometimes in a very difficult position indeed. But we have to deal with a custom which has become inveterate, and which nothing we could say would in the least alter. What is the course which this Court ought to take in questions of this kind? Here is this kind of practice thoroughly understood, and acted on from day to day. Contractors know well that the engineers are put into a position which makes them not the most proper arbitrators that could be selected. They know that the engineer is employed by the other party to the contract, that he has to watch the work and determine whether the materials are good or not, whether the work is or is not properly done, and that any question between the two contracting parties will probably be a question which the engineer, in the course of his employment as engineer, has already had before him, and had to consider and form some judgment upon. With that knowledge the contractor does enter into that kind of contract, that the engineer's decision shall be absolutely final, that he shall be put into the position of an arbitrator, and shall be a judge from whose decision there is no appeal whatever. I have no doubt that is done mainly because the engineers are men of known integrity, far above any suspicion of improper dealing, and the contractors are content to be bound by the decision of an arbitrator who is in a position of considerable difficulty. Also, I daresay, the other motive mentioned by Lord

Justice LINDLEY has very much to do with it, that competition is so keen that railway companies and great employers of labour have no difficulty in obtaining contractors willing to submit to such terms.

In this case there has been first of all, the faintest suggestion of collusion between the engineers, who are celebrated men, and the defendant to this action, who is the original contractor, the plaintiffs being sub-contractors. I disregard entirely the suggestion on that point,—because it does not come to more than a mere suggestion. There would be the greatest possible danger of interminable litigation if an arbitration clause of this kind could be set aside on a mere suggestion such as this. I am sorry that on such very insufficient materials, so grave a charge should have been made at all.

The most material thing which has been put forward in evidence in order to show that the arbitrators are not proper arbitrators is this. It is said,—and although no particular instance is given the evidence is supported in a way I will indicate in a moment,—that these engineers have passed and approved various materials which the sub-contractors were bound, under their sub-contracts, to put together to construct this overhead railway. Now the sub-contractors say: “Having already approved these materials, you are the very last persons who should be made arbitrators on the question whether the materials are good or not.” That struck me as being the strongest point that was made for the plaintiffs. They confirmed their evidence by specifying the dates of the letters which they had written to the engineers, complaining of the goodness of some of the iron materials furnished; and besides that they had made verbal representations to the same effect. But these representations had been treated as frivolous; that is to say,—I am putting it as it was put in argument—the engineers had exercised their judgment against the plaintiffs, and in such a manner as to make them most unfair arbitrators upon any question as to the sufficiency of the materials which they had already approved. But then one must look back to the contracts. They seem to me to have this effect. In the original contract the materials were to be such as the engineers should approve, and their approval was made sufficient as between the contracting parties; so that, in the absence of *mala fides*, if the engineers did approve, there was an end of the matter.

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The contractor was bound by that approval. In the sub-contracts the original contract is adopted to that extent, and the sub-contractor, who has not to furnish any materials himself, takes these from Willans, the person with whom he contracts, and takes them upon the terms of the original contract, that they shall be materials which the engineers have approved. As between Willans and the company, and therefore, again, as between Ives and Willans, the approval by the engineers of the nature of the materials is to be binding. Suppose the arbitrators were third persons, and a question were raised whether the materials were good or not, and it was proved, in the absence of any suggestion of misconduct, that the engineers had passed these materials. I think the arbitrators would not go behind their approval for a moment. They would say, That is by the contract sufficient evidence that the materials were proper and right. No Judge and no arbitrator would allow evidence to show that the approval of the engineers was improper. That is one answer. Another is this, and it is one which I cannot get over. These parties with their eyes open entered into this contract, agreed that the engineers' approval should be sufficient; and they agree that in any question which had to be submitted to arbitration, these engineers should be the arbitrators. For them now to turn round and say, "We can only say that you did approve the materials, and we allege that the materials were not good," is simply not to fulfil that stipulation. I think the plaintiffs' case is not made out, even upon that argument which seems to me the strongest used by them in this case to show that the arbitrators are not proper persons to decide the questions between the parties.

I have very little more to add. It is said that there is sufficient reason for not allowing this arbitration to go on in the fact that the action has to proceed as to a very small part of the plaintiffs' claim. That is certainly a matter for the Court to regard. But how much of the action is allowed to go on? Seeing what a very small part it is of the question raised between the parties, and that it relates merely to a comparatively small question not included in the agreement, I do not think there is sufficient reason on that ground to prevent the arbitration going on.

On the whole, though I feel very much impressed by the difficulty of the position in which these arbitrators are placed by reason of their being both arbitrators and engineers of the company, I do not think a sufficient case has been made out for allowing the action to go on, and I think the learned Judge was right in the conclusion at which he arrived, and that this appeal should be dismissed.

Appeals dismissed.

Solicitors: *Jas. Kirkley*, for *Davidson & Barker*, South Shields,
for the Appellants.

Addleshaw, Warburton & Trenam, for *Addleshaw & Warburton*, Manchester, for the Respondents.

IN RE WINKLE.

1894, May 7. LINDLEY, LOPES AND KAY, L.JJ.

Lunatic—Maintenance—Judgment Creditor—Execution—Receiver in Lunacy—Maintenance of Lunatic's Wife—Lunacy Act, 1890 (53 Vict. c. 5), ss. 116, 117.

In sanctioning a scheme for the maintenance of a lunatic under sections 116 and 117 of the Lunacy Act, 1890, the Lords Justices will not allow the lunatic's wife maintenance out of his property as against his creditors.

An action was brought against a person of unsound mind not so found and on 16 March, 1894, judgment was obtained. On 17 March the judgment creditor lodged a writ of *fi. fa.* with the sheriff, and he, on the morning of 19 March, executed the writ and seized the lunatic's goods. The lunatic's wife, on the afternoon of the same day, obtained an order appointing her interim receiver pending the hearing of a summons in lunacy, which had been taken out by her on 12 March, asking for leave to sell the lunatic's property and to retain out of the proceeds of sale a certain sum weekly for the maintenance of herself and the lunatic. The sheriff thereupon gave up possession of the goods to the wife. On the hearing of the summons the scheme for maintenance was approved of by the Master in lunacy. The Lord Justices confirmed the scheme so far as the maintenance of the lunatic was concerned, but refused to include the maintenance of the wife in the scheme, and made the order without prejudice to any priority or charge the executors might have acquired by lodging the writ of *fi. fa.* with the sheriff.

THE above-named Edward Winkle, who carried on business as a music seller and teacher at Great Malvern, Worcestershire,

became of unsound mind, but was not so found by inquisition, and was on 12 January, 1894, removed to the Worcestershire County Asylum. On 9 February, 1894, his bankers, Messrs. Berwick, Lechmere & Co., commenced an action against him in the Queen's Bench Division to recover 315*l.* 7*s.* 6*d.*, the amount of his overdraft, and on 16 March obtained judgment under Order XIV. The plaintiffs, on Saturday, 17 March, lodged a writ of *fi. fa.* with the sheriff, who on Monday, 19 March, at 11 o'clock A.M., executed the writ and took possession of the defendant's goods. On 12 March the lunatic's wife took out, under section 116 of the Lunacy Act, 1890, a summons which was returnable on 21 March, asking that the applicant might be at liberty to sell the stock-in-trade and goodwill of the lunatic's business, together with the lease of the business premises, and out of the proceeds of such sale to retain the sum of 2*l.* weekly for the maintenance of herself and the lunatic until further order, and also to pay the costs of defending the action in the Queen's Bench Division, and the costs of this application when taxed. On 19 March, at 4.15 P.M., Lord Justice DAVEY made an order appointing the present applicant interim receiver of the lunatic's property, with power to enter into immediate possession thereof, before giving security, until this summons should have been heard. On 21 March Mr. Justice GRANTHAM made an order staying all proceedings under the judgment in the Queen's Bench Division, and directing the sheriff to withdraw, and the sheriff accordingly did so. The Divisional Court, on the plaintiff's appeal, reversed the order of Mr. Justice GRANTHAM, but directed that no fresh proceedings should be taken to enforce the judgment by the writ of *fi. fa.* until the matter had been heard before a Judge or Master in lunacy.

The present summons having been adjourned from 21 March to 3 April, came on before the Master on that day, and he made an order appointing the applicant receiver to sell all the assets of the lunatic, pay the proceeds into Court, and invest in consols, and out of the dividends and corpus by the periodical sale of consols to raise 1*l.* per week for the maintenance of the lunatic and 1*l.* per week for the maintenance of the applicant, his wife, and to pay the costs of the application and of defending the Queen's Bench Division action out of the estate. The summons had been referred by the Master

to the Court, and now came on for their Lordships' approval of the scheme for the maintenance of the lunatic and his wife, under section 116 (1) and (2) of the Act of 1890.

E. S. Ford, for the applicant :

The appointment of the receiver put the property of the lunatic under the protection of the Court. That was a judicial act, and judicial acts take effect at the earliest possible moment of the day on which they occur : *Wright v. Mills* (1). The Court will protect the property against creditors : *In re Pink* (2), and even against a judgment creditor : *In re Pountain* (3), and notwithstanding such creditor may have obtained a charging order : *In re Plenderleith* (4). I ask your Lordships to confirm the Master's scheme, although Lord Justice DAVEY's order did not include the maintenance of the lunatic's wife.

[LINDLEY, L.J. : Section 117 of the Lunacy Act, 1890, says nothing about the maintenance of the wife. Have you any authority for including her ?]

No, except in so far as it was done in *In re Pink* (2).

[LINDLEY, L.J. : Under sections 116 and 117 I doubt very much whether we can support the family at the expense of the creditors.

LOPES, L.J. : By section 116, subs. 4, the powers of the Act relating to management and administration are exerciseable in the discretion of the Judge for the maintenance or benefit of the lunatic, "or of him and his family." It is a strong thing, I think, to prefer the lunatic to his creditors, but to go a step further and prefer his wife to his creditors is stronger still.]

Ernest Pollock, for the judgment creditors :

From the Saturday on which the writ of *fi. fa.* was delivered to

(1) 4 H. & N. 488 ; 28 L. J. Ex. 223 ; 7 W. R. 498.

(2) 23 Ch. D. 577 ; 52 L. J. Ch. 674 ; 49 L. T. 418 ; 31 W. R. 728.

(3) 37 Ch. D. 609 ; 57 L. J. Ch. 465 ; 59 T. L. 76.

(4) 2 R. 625 ; [1893] 3 Ch. 332 ; 62 L. J. Ch. 993 ; 69 L. T. 325 ; 42 W. R. 224.

the sheriff, the judgment creditors had a good title to the property of the lunatic, for although the summons had at that time been taken out in lunacy, no receiver was then appointed. I ask that they should be included in the scheme, and that they should receive a payment on account, as their judgment debt carries interest. They are entitled to have their priority established and declared over all other creditors.

[KAY, L.J. : We cannot declare your priority over other creditors who are not before us. You may or may not have priority, but you will be safe if we make an order without prejudice to your rights. You cannot ask the Court to overrule the decision in *In re Plenderleith* (4).]

No, for I do not invoke the assistance of the Court inasmuch as I was secured by the judgment obtained before these proceedings were taken. It is the applicant who asks for protection. The sheriff could have held the goods as against the receiver.

[KAY, L.J. : I doubt that.]

The goods are bound from the delivery of the writ of *fi. fa.* to the sheriff. I can support that proposition by authority.

LINDLEY, L.J. : The position of affairs is this. In point of fact, the property of the lunatic is now subject to the control of the Court by reason of the appointment of the receiver. What is to be done? The execution creditor is not entitled, as the law stands, to take property of the lunatic under the protection of the Court and turn him into a pauper lunatic asylum. That is settled law, and has been the law for centuries, and we are not going to alter it. On the other hand we think it just to preserve to the creditor all his rights, subject to the maintenance of the lunatic. I think there is no authority for retaining the *l.* a week to the lunatic's wife in the order, and the proper order will therefore be to confirm the scheme authorized by the Master striking out the *l.* a week to the wife, the costs of the applicant to come out of the lunatic's estate, and the judgment creditor to

add his costs to his judgment. It is quite possible that the lunatic may be taken into the care of the wife and then the maintenance will be increased. The order will provide that no variation be made in the scheme now confirmed without notice to the creditor, and it will also be without prejudice to any charge or priority the judgment creditor may have acquired by lodging the writ of *fi. fa.* with the sheriff on 17 March, 1894. In the event of the death of the lunatic the creditor will have to apply to the Master.

LOPES and KAY, L.JJ., concurred.

Solicitors: *Street, Poynder & Whatley*, for *H. L. Whatley*, Malvern,
for the Applicant.

Black & Moss, for *Edward Nevinston*, Malvern, for the
Judgment Creditors.

PEEK *v.* RAY.

1894, May 9. LINDLEY, LOPES and KAY, L.JJ.

Practice—Interrogatories—Allowance of interrogatories by Judge—Right to Object in affidavit in answer—Appeal—R.S.C., Nov. 1893, Order XXXI. r. 2—R.S.C. 1883, Order XXXI. r. 6.

Semble, one co-executor's answer to interrogatories cannot be used as an admission against his co-executor.

Although a Judge has, under R.S.C. 1893, Order XXXI. r. 2, gone through proposed interrogatories and struck out parts of them, and given leave to deliver them as amended, the party interrogated may, as provided by R.S.C. 1883, Order XXXI. r. 6, take by his affidavit in answer any proper objection he may have to answering them.

The allowance of such amended interrogatories is a matter in the Judge's discretion, and an appeal against it will not succeed unless a strong case of error in principle or of substantial injustice can be made out.

APPEAL from North, J.

This action was commenced on 20 April, 1893. On 24 June, 1893, an order was made giving the defendant Archibald leave to defend on behalf of both defendants.

On 16 April, 1894, Mr. Justice NORTH, at chambers, having gone through the plaintiff's proposed interrogatories and struck out parts of

them, gave leave to deliver them as altered to both the defendants, who were co-executors. The defendant Archibald appealed.

Cozens-Hardy, Q.C., and *Montague Lush*, for the appellant :

An appeal is now, under the rules of November, 1893, our only remedy. Any objection, whether to the set of interrogatories or to any one of them, must be taken before the Master ; and when they have been allowed we are precluded from objecting. If this were not so, the effect of the new rules would be to double the cost, since the matter would have to be gone into twice over.

The interrogatories are such as should not have been allowed. They are premature. In possible events it will never be necessary for us to answer at all.

Archibald is entitled to object to Ray being interrogated at all, both because Archibald has the conduct of the defence and because Ray's answer, they being co-executors, would be evidence against Archibald.

[LINDLEY, L.J. : I doubt if it would be evidence against Archibald. Certainly it would not have been unless they had been co-executors (1). You could not use it in the case of co-trustees (2).]

Swinfen Eady, Q.C., and *Christopher James*, for the plaintiff, were not called on.

LINDLEY, L.J. : This is a motion which is rather peculiar. There is an action by Mr. Peek, a surviving partner of the testator, against Mr. Ray, who is also a surviving partner, and Mr. Archibald, who, with Mr. Ray, are the executors of the testator. There is a controversy as to whether a certain scheme of compromise is binding. The plaintiff has administered interrogatories, and the learned Judge, under the orders of November, 1893, has looked into the matter and given leave to deliver these interrogatories to both Ray and Archibald. Now Archibald appeals, and says : " You have no right to deliver them to Ray, because his answers may prejudicially affect me." That strikes me as a most extraordinary appeal. I never heard of one defendant appealing against an order

(1) See *For v. Waters*, 12 A. & E. 43 ; 4 P. & D. 1.

(2) See *Davies v. Ridge*, 3 Esp. 101 ; 6 R. R. 817.

that another defendant should answer interrogatories. Then it is sought to make out that at any rate the order should be against Archibald only, because he has liberty to defend on behalf of both the executors. That is no reason why Ray should not be interrogated. I dismiss that whole argument because I think it is utterly wrong. There is more to be said. The learned Judge has required Archibald to answer certain interrogatories, and has gone into the matter and come to the conclusion that these interrogatories ought to be allowed. What ought we to do? Ought we to scan these interrogatories and in fact settle them? I protest altogether against doing anything of the kind. I admit the right of appeal, and it is our duty to entertain the appeal and see whether there is any substantial injustice done by the order. Now in substance it appears to me there is nothing wrong. The appeal is brought upon an erroneous theory that the Judge has predetermined that no objection to answering any of them can be taken in the affidavit in answer. There may be lots of objections, which it is perfectly open to the defendant to take by his answer; and when he has taken them by his answer it will be the duty of the Judge to determine whether he must answer. There may be, for instance—I don't suppose there will be in this case, but theoretically there may be—the objection that to answer would tend to criminate the person answering. So there may be many others. The only point upon which the Judge is likely to have made up his mind is that, so far as he can see at the time, a particular interrogatory is not premature. But if the defendant can make an oath and show facts which make out that it is premature, it is open to the Judge to consider that.

I protest against there being any appeal to this Court in such a case. It is a matter for the discretion of the learned Judge, and we are not here to review that discretion, unless it can be shown that some substantial injustice has been done.

LOPES, L.J.: I am of the same opinion. The interrogatories were delivered under the new rules of November, 1893, and one objection taken by the appellant is that there is no right to administer interrogatories to Ray, the other defendant; but the main objection is that these interrogatories are premature.

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The learned Judge has allowed these interrogatories. He has carefully gone through them, and has made certain alterations, striking out certain things which he considers ought not to be in the interrogatories. Then there is an appeal to this Court. Unless there is some error, or some question of principle involved, or some substantial injustice done, this Court will not entertain an appeal of that kind. It is suggested that the Judge, by allowing the interrogatories, has precluded the party interrogated from taking any objection to answering. In my opinion that is incorrect. What the Judge does when he allows the interrogatories is this: he determines whether it is a proper case in which interrogatories ought to be delivered at all, and then, under the new rules, he deals with each interrogatory, to see whether, *primâ facie*, on the face of it, each interrogatory is a proper one. Then he allows the interrogatories, but he does not preclude any objection being taken by the party interrogated. To my mind that is made perfectly clear by Order XXXI. r. 6 of the Rules of 1883—not of the new orders. It says: “Any objection to answering any one or more of several interrogatories on the ground that it or they is or are scandalous or irrelevant, or not *bonâ fide* for the purpose of the cause or matter, or that the matters inquired into are not sufficiently material at that stage, or on any other ground, may be taken in the affidavit in answer.” That rule remains in force, and, to my mind, makes it absolutely clear that the allowance does not preclude the objection being taken in the way there provided for. I think, therefore, that this appeal should be dismissed.

KAY, L.J.: I entirely agree with the judgments which have been pronounced. In this case the first objection made is a most extraordinary one, and before I notice any of the objections I wish to say, speaking for myself, that where a Judge has, under this new rule, had the interrogatories brought before him, and has determined whether he will allow them or not, or which of them or what part of them he will allow, if any one chooses to appeal against such an order he can only hope to succeed if he can show some serious question of principle in which the Judge has, in the leave he has given, made a material error. To say that this Court is to

be asked to look through the interrogatories which a Judge of first instance has allowed to see whether this, that or the other part of an interrogatory has been properly allowed or not is, to my mind, a total mistake as to the functions of the Court of Appeal. That allowance is very largely within the discretion of the Judge before whom the matter is brought, and the usual rule in such cases is that no appeal will be allowed to succeed unless it can be shown that a very material mistake indeed has been made.

The first argument for the appellants is this. Two co-executors are made co-defendants to an action which has for one of its objects rescission of an agreement intended to facilitate the winding-up of the affairs of a former partnership in which their testator was a partner. One of these defendants has been allowed to conduct the defence on behalf of both, for the reason that the other is a surviving partner, and might have interests in conflict with those of the deceased man. The objection is the most extraordinary one I ever heard of. He says, "The plaintiff shall not administer interrogatories to my co-executor because I have a suspicion that the answers may be prejudicial to me." The plaintiff wants to get at the truth of the case, and to get admissions from each of the defendants. I am extremely doubtful whether the answer of the one co-executor can be used against the other, but whether it can or not that does not prevent the plaintiff from administering interrogatories to the defendant Ray, and particularly where the Judge has given him leave to do so.

The rest of the appellant's objections to the order depend upon a close examination of the interrogatories. The only material one is this: certain interrogatories regarding the accounts of the parties have been delivered to make out what are the defendant's objections on principle to certain accounts. The Judge has said, subject to certain alterations which show that he did not intend the details of the accounts to be furnished, "I allow these interrogatories." The objection is that these are premature, because an account may never be necessary, and that because the Judge has allowed them the thing will be *res judicata*, and the Judge will be bound by his order. The Judge allows these interrogatories subject to the orders of the Court, and one of these, which is not abolished by the new rules, is Order XXXI. r. 6, to which Lord Justice LOPES has just

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referred, and which enables anyone to raise by his answer any objection which he may have. If he did so it would be then, and then, I think, for the first time, that the Judge would have to consider and dispose of his objection. The allowance of interrogatories by a Judge under the new rules means no more than this: "I allow these interrogatories subject to any objection to answer which the person interrogated may have a right to make, and, notwithstanding my allowance of the interrogatories, he may make the objection just as if I had not allowed them." The Judge has merely given leave to administer the interrogatories, and that does not, even if he goes through them and strikes out part, mean that he has prejudged the question whether the interrogatories ought to be answered or not.

I think these appeals ought to be discouraged in every way possible, and that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Paines, Blyth & Huxtable*, for the Appellants.

Druces & Attlee, for the Respondents.

IN RE LONDON (MAYOR) AND TUBBS.

1894, April 30; May 10. LINDLEY, LOPES AND KAY, L.JJ.

Vendor and Purchaser—Sale of Land—Conditions of Sale—Wilful Default of Vendors—Interest on Purchase-money.

In a contract for the sale of land one of the conditions was that if from any cause whatever other than the wilful default of the vendors the purchase should not be completed by a certain date, interest should be paid upon the purchase-money by the purchaser. The particulars and conditions of sale stated that the whole of the property had been acquired under a certain Act of Parliament, and was being sold under the powers of such Act, but the sale plan showed that portions of the property had been acquired under a later Act. The misdescription arose through the inadvertence of the vendors to examine the title before the particulars and conditions of sale were framed. The title to the whole of the property sold was not made out or accepted by the purchaser until after the date fixed for completion, and the purchase was not finally completed for some months later. The real cause of the delay was, as a matter of fact, the difficulty of the purchaser in obtaining the purchase-money. In these circumstances held by LINDLEY and LOPES, L.JJ. (KAY, L.J., dissenting), that the omission to verify the statement as to the title did not amount to wilful default on the part of the vendors within the condition, and that they were entitled to interest on the purchase-money until completion.

APPEAL of H. T. Tubbs from the decision of Chitty, J., dated 13 February, 1894.

The point raised by this appeal was whether the purchaser of certain land from the corporation of the city of London was bound to pay interest at 5 per cent. upon the unpaid balance of his purchase-money—a sum of 88,290*l.*,—for a period of three months from June to September, 1892. On 18 March, 1892, the site of the old Farringdon Market was put up to auction by the City Corporation and was purchased by Tubbs for 98,100*l.*, and he paid 9,810*l.* as a deposit. The particulars of sale stated that the property was acquired by the corporation in 1824 under an Act of 5 Geo. IV., c. 151, and that the property was sold under the powers of that Act. The conditions of sale provided for the completion of the purchase on 24 June, 1892, and that if from any cause whatever, other than “wilful default” on the part of the vendors, the purchase-money should not be then paid, the purchaser should pay interest on the unpaid balance at 5 per cent. per annum from that day up to

the day of completion. After the delivery of the abstract and requisitions it was discovered that the sale-plan comprised various plots of land (amounting to about a tenth of the whole) which were not specified in the deposited map referred to by the above Act as being acquired under that Act, and, the purchaser having raised objections on the point, the purchase was not completed on the date fixed by the conditions. These plots of land had in fact been acquired by the vendors under the Holborn Improvements Act, 1864, and were saleable under their general powers, and, the vendors having delivered a further abstract on 25 June, 1892, the title to the whole land purchased at the auction was accepted 29 September, 1892, but the purchase was not actually completed until February, 1893. The purchaser contended that the vendors were not entitled to interest from 24 June to 29 September, 1892, on the unpaid purchase-money, on the ground that through their own inadvertence they themselves had made the mistake which had occasioned the delay, and that this was "wilful default" within the condition.

The learned Judge held that there had been no "wilful default," and that the Corporation were entitled to the interest which they claimed.

The purchaser appealed.

Lerett, Q.C., and Vernon Smith, for the appellant:

The delay was owing to the wilful default of the respondents. This default consisted of a misstatement found out only a few days before the time fixed for completion. We could not then have prudently completed without a further abstract: *In re Young and Harston's Contract* (1), *In re Hetling and Merton's Contract* (2). At no time before 29 September could a prudent purchaser have completed. We contend that the not making the necessary investigation before the particulars and conditions of sale were framed was wilful: *Elliott v. Turner* (3), *De Visme v. De Visme* (4), *Sherwin v. Shakspear* (5).

(1) 31 Ch. D. 168; 54 L. J. Ch. 1144; 53 L. T. 837; 34 W. R. 84.

(2) 2 R. 543; [1893] 3 Ch. 269; 62 L. J. Ch. 783; 69 L. T. 266; 42 W. R. 19.

(3) 13 Sim. 485.

(4) 1 Mac. & G. 336; 18 L. J. Ch. 159; 19 *ib.* 52.

(5) 17 Beav. 267; 5 De G. M. & G. 517; 23 L. J. Ch. 177, 898; 1 W. R. 460; 2 *ib.* 668.

Whitehorne, Q.C., and A. J. Allen, for the respondents :

There has been no wilful default within the meaning of the condition. The mistake occurred by inadvertence. To constitute wilful default there must be an exercise of the will founded on knowledge. An illustration is found in those special contracts of railway companies taking risk of all damage except that arising from wilful misconduct of officials : *Lewis v. Great Western Railway* (6).

[KAY, L.J., referred to *In re Young and Harston's Contract* (1) : If there was a duty which was omitted it must be said that the omission was voluntary.]

They referred to *Sherwin v. Shakspear* (5), Fry on Specific Performance, 3rd edit., § 790, *Williams v. Glenton* (7). The words of the condition must mean, "if from any cause whatever" : *De Visme v. De Visme* (4), *Greenwood v. Churchill* (8). The real reason for delay was that the purchaser had not the money ready. This the learned Judge has found as a fact.

Lerett, Q.C., in reply, referred to Redgrave v. Hurd (9) :

[LOPES, L.J. : It seems to me a perversion of the words to say that innocent mistake is wilful default.

LINDLEY, L.J. : It is the distinction between willing not to do a thing and not willing to do it. Does carelessness on the part of a servant amount to wilful default on the part of the principal?

KAY, L.J. : The question is, is every omission of a positive duty wilful?]

As to *Lewis v. Great Western Railway* (6), I agree that there is no distinction between misconduct and default.

Cur. adv. vult.

(6) 3 Q. B. D. 195; 47 L. J. Q. B. 131; 37 L. T. 774; 26 W. R. 255.

(7) 34 Beav. 528; L. R. 1 Ch. 200; 35 L. J. Ch. 284; 13 L. T. 727; 13 W. R. 1030; 14 *ib.* 294.

(8) 8 Beav. 413; 14 L. J. Ch. 143.

(9) 20 Ch. D. 1; 51 L. J. Ch. 113; 45 L. T. 485; 30 W. R. 251.

May 10.

LINDLEY, L.J. : This is an appeal by a purchaser from an order of Mr. Justice CHITTY, directing him to pay interest on his purchase-money according to certain conditions of sale. By those conditions the purchase was to be completed on 24 June, 1892, and "if from any cause whatever, other than wilful default on the part of the vendors, the purchase-money was not then paid," it was to bear interest at 5 per cent. It is obvious from the language of this condition, that a distinction is intended to be drawn between defaults on the part of the vendors which are "wilful" and those which are not; and that interest is to be payable, even although there may be some default non-wilful on the part of the vendors, and some delay in the completion of the purchase occasioned by that default. In order to exonerate the purchaser from liability to pay interest he must prove some "wilful default," on the part of the vendors, which caused delay in the completion of the purchase. Proof by the purchaser that he could not prudently complete the purchase by the day named, owing to some difficulty arising on the investigation of the vendors' title, is not of itself enough to exonerate the purchaser from payment of interest, for it is quite possible that the difficulty may not be owing to any wilful default on the part of the vendors. Lord COTTENHAM'S observations on this subject in *De Visme v. De Visme* (4) were corrected in *Sherwin v. Shakspear* (5), and ever since that decision the Courts have always recognized the distinction between wilful and non-wilful defaults in dealing with conditions of sale worded like that before us. The meaning of the term "wilful default" in conditions of this kind was carefully examined in *Williams v. Glenton* (7), *In re Young and Harston's Contract* (1), and *In re Hetling and Merton's Contract* (2), but none of these cases quite cover the present case, as there was not in them, as there was here, a misstatement by the vendor of the nature of his own title. This misstatement arose from a very natural, though unfortunate, oversight of the vendors' agents. The property sold all belonged to the vendors, and they had for years been in possession of it, and their title was in fact free from all objections; and their solicitors, who are responsible for the preparation of the particulars and conditions of sale, knew this to be the case. Their knowledge of the goodness of the title led them to be

less careful than they otherwise would have been in describing it. They described it thus in condition 4:—"The property was purchased and taken by the vendors in or about the year 1824, under the powers of an Act 5 Geo. IV. c. 151, and has for many years past been used or retained for the purposes of Farringdon Market, and is now being sold under a statutory power so to do. A copy of the said Act may be seen at the office of the Comptroller of the Chamber of the City of London . . . and the purchaser, whether he shall inspect the same or not, shall have, and shall be deemed to have purchased with, full notice of everthing contained in, or to be implied from, the provisions of the said Act." Now this statement was incorrect. The great bulk of the property had been acquired nearly fifty years ago under the statute referred to. But about one-tenth of it was acquired considerably later, twenty-six or twenty-seven years ago, and for the last quarter of a century both portions had been thrown together and used as one market-place. Unfortunately, the title was not examined, or not examined with proper care before the conditions of sale were framed. This was unquestionably a default, but, in my opinion, it was not "wilful." I do not propose to examine this word with scientific accuracy; it is sufficient to observe that to make up one's mind not to verify a statement is "wilful," but that simply not to think about verifying it is not wilful. I am aware that in *Elliott v. Turner* (3) Vice-Chancellor SHADWELL expressed the opinion that forgetfulness might amount to wilful default. The case before him was, however, of a very different kind from the present. I confess that I am more disposed to concur with Lord BRAMWELL's observations on the term "wilful misconduct" in *Lewis v. Great Western Railway* (6). They are, in my opinion, quite consistent with Lord BOWEN's observations in *In re Young and Harston's Contract* (1), if it be borne in mind that Lord BOWEN presupposed knowledge of what was done, and intention to do it, and was not addressing himself to a case of an honest mistake or oversight. No doubt the statements contained in the fourth condition were deliberate, and to that extent "wilful"; but the misstatement was not "wilful." It arose from this, that owing to the fact that the market-place had for years been one property, the necessity for verifying the statement never occurred to the vendors or their agents. I cannot hold that this omission was

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under the circumstances a "wilful default." The conclusion thus arrived at is sufficient to dispose of this appeal. But the case is very near the line, and therefore I will add that the more closely the facts are investigated the more reason there is for coming to the conclusion that the real cause of the delay in completing the purchase was the inability of the purchaser to find the purchase money. The fact that he did not and could not complete the purchase for months after all difficulties in making out a title were cleared up throws a strong light on the purchaser's alleged ability to complete on the day originally fixed for completion. The vendors' default is seized on as justifying the delay; but I am not at all satisfied that that default was the real cause of the delay. Mr. Justice CHITTY did not believe that it was, nor do I. The appeal must be dismissed.

LOPES, L.J.: Conditions with regard to payment of interest are framed in different ways. They sometimes make interest payable if delay arises from any cause whatever, or if delay arises through the purchaser's default, or if completion is delayed from any cause whatever, other than wilful default on the part of the vendors. It is the last form of condition which the Court has to consider in this case. I am clearly of opinion that there was default by the vendors. They made a positive and specific representation that the whole of the property was sold under a statutory power contained in a specified Act of Parliament. This was not the fact; one-tenth of the property sold was not comprised in that statutory title. This the vendors might have ascertained if they had verified by proper investigation the documents in their possession. It was reasonable in the circumstances that they should have done this; they omitted to do something which it was their duty to have done, having regard to the positive statement they undertook to make, and having regard to their relations with intending purchasers. There was, therefore, "default"; but it must be "wilful" and have caused delay in completion in order to exonerate the purchaser from payment of interest. Admittedly the fault was not intentional, it was an oversight, an oversight easily accounted for, having regard to the fact that the vendors had been in pos-

session of the whole property for many years, and that nine-tenths of it was included in the statutory title, and the whole passed under the name of, and was regarded as, the "Farringdon Market." It was an honest mistake, and unintentional. It seems to me a perversion of the word "wilful" to hold such a default "wilful." It was, as I have said, a default; but to describe it as "wilful" would be a misapplication of that qualifying epithet. There would be no distinction then between what was intentional and what was unintentional and accidental; both would be visited with the same consequences. There are expressions in the judgment of Lord Justice BOWEN in *In re Young and Harston's Contract* (1), which are relied upon. The learned Lord Justice, speaking of "wilful," said that nothing blameable is denoted; "it amounts to nothing more than this—that he knows what he is doing, and intends to do what he is doing, and is a free agent." I do not think the learned Judge was contemplating an honest oversight. He was dealing with a different case, where, two days before the time fixed for completion, the vendor left England without having executed the conveyance which was ready for his execution in the afternoon of the day fixed. Sir James HANNEN said: "Our judgment is, that where a man, knowing that some act has to be done by him on the particular day, goes away in disregard of that obligation, he is guilty of default; and, doing it intentionally, it is wilful within the terms of a contract of this kind." What the vendor did there was not regarded as a mistake, much less an honest or unintentional oversight. That case, in my judgment, is distinguishable from the present, and expressions applicable to that case are inapplicable here. In *Lewis v. Great Western Railway* (6), Lord Justice BRAMWELL said (10), defining "wilful" in connexion with misconduct: "Wilful misconduct means misconduct to which the will is a party, something opposed to accident or negligence; the misconduct, not the conduct, must be wilful." This, to my mind, is a more accurate definition of "wilful" than that given by Vice-Chancellor SHADWELL in *Elliott v. Turner* (3), where he says: "In my opinion the word 'wilful' can have no other meaning than spontaneous; and if the neglect or default in this case arose from the voluntary act of the parties, whether awake or asleep with reference to their rights

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and interests, and did not at all arise from the pressure of external circumstances over which they could have no control, I apprehend that the neglect or default was wilful." It is difficult to lay down any general definition of "wilful." The word is relative, and each case must depend on its own particular circumstances. I cannot think the default here "wilful." But even assuming there was wilful default, I am of opinion that the delay in the purchase was not fairly attributable to it. The delay arose from the fact that the purchaser was not ready with his purchase money, which is evidenced by the fact that he did not complete till long after September 29, and has paid interest for the interval between that day and the time of completion. The appeal must be dismissed.

KAY, L.J.: The question is as to the meaning of "wilful default" in the usual condition of sale that "if from any cause whatever other than wilful default on the part of the vendors" the purchase money (excepting the deposit) should not be paid on 24 June, 1892, the day fixed for completion, interest thereon at 5*l.* per cent. should be paid by the purchaser. The property was of great value, having a considerable frontage to Farringdon Street in the City of London. [His Lordship referred to the above condition and continued:] At the sale on 18 June, 1892, Tubb bought the property for 98,100*l.* under these conditions and paid 9,810*l.* deposit, leaving 88,290*l.* the remainder of the purchase money to be paid upon completion. Interest is claimed on this sum from 24 June to 29 September, 1892, amounting to over 1,100*l.* The purchaser contends that he should not be compelled to pay this interest, because the delay during that period was occasioned by the vendor's wilful default. The purchaser did not inspect the Act 5 Geo. IV. c. 151 before the sale. On March 22, 1892, a copy of the Act was sent to his solicitors but without any copy of the plan referred to in it. On 9 April, 1892, the purchaser sent in requisitions including a requisition for a copy of the plan. On 28 April this was answered by an offer to allow inspection of the plan, but no copy was sent. On 7 May the purchaser's solicitors asked when the plan might be seen and were told on the 12th that it might be inspected at any time on giving one day's previous notice. Some delay took place about obtaining a

faculty enabling the removal of human remains from a portion of land which had formerly been a burial ground. This faculty was obtained on 23 June. In the meantime on the 16th the purchaser's solicitors inspected the plan and found that a most important and essential part of the property fronting Farringdon Street was not acquired by the vendors under the Act of 1824. It appeared on subsequent enquiry that this part was acquired under the Holborn Valley Act, 1864, and that the vendors had not had possession of it for 30 years at the date of the sale. This, it is said, prevented the completion of the sale on 24 June. The next day, the 25th, a further abstract was delivered relating to this portion of the frontage. Requisitions on this abstract were delivered on 28 July. There was some difficulty about producing the title-deeds and the title was not accepted till 29 September. From that date the purchaser has paid interest. In this state of circumstances the vendors contend that there was no wilful default on their part. The misstatement, they say, was made by inadvertence; it was not a wilful misstatement. The purchaser answers, the default was not the misstatement, but the omitting to examine the act and plan before making the statement, the act and plan being all the time in the vendors' possession. This the purchaser urges was "wilful." If the vendors had examined the plan and had omitted to observe that the Act did not include the frontage, that might have been inadvertence not "wilful default." But no examination whatever was made. The vendors making such a statement had a duty to the purchaser to take care, by examining the plan which was in their own possession, to avoid an inaccuracy. Instead of this, whoever framed these conditions trusted to his general idea of what the vendors' title was and neglected to make that search to verify it. The purchaser urges that this neglect was the default, and that the default was wilful because the person who made it willed not to make the search, which it was his duty to the purchaser to make, before making the positive statement in the conditions. I am not able to find an answer to this argument which is satisfactory to my mind. If the vendors had not made the positive statement as to all the land being held under the statute referred to, or if having made it, they or their agent had taken some steps to verify it and had in so doing committed a *bonâ fide* mistake, the case might be different.

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But according to the evidence no attempt to verify the statement was made, and the omission to do this was not only a default but was a "wilful default" because it was a deliberate neglect of a duty to the purchaser, which the vendors by making the positive statement voluntarily assumed. But did this occasion the delay Assuming that the vendors were in default, the purchaser voluntarily delayed from 7 May till 16 June to examine the plan, and again after the further abstract was delivered on 25 June he sent in no requisitions till 28 July. There is no excuse for these delays, and the learned Judge found that the reason was a difficulty in obtaining the purchase money. On this ground I am prepared to concur in his decision.

Appeal dismissed.

Solicitors: *Chapple, Welch & Chapple*, for the Appellant.

H. H. Crawford, City Solicitor, for the Respondents.

LEMMON v. WEBB.

1894, April 24, 25, 26, 27; May 8. LINDLEY, LOPES AND
KAY, L.JJ.

Nuisance—Overhanging branches of Trees—Abatement—Notice of Intention to Abate.

The encroachment of boughs and roots over and within the land of an adjoining owner is a nuisance, and not a trespass upon or occupation of that land which by lapse of time could become a right.

Where branches of trees, of whatever age, growing upon the land of one owner, overhang the land of another owner, the owner of the land encroached upon may without notice, provided he does it without entering upon his neighbour's land, cut so much of the overhanging branches as encroaches upon his own land.

APPEAL from Kekewich, J.

The plaintiff and the defendant had been adjoining owners since 1881. In January, 1893, the defendant, without giving the plaintiff any notice of his intention, cut several branches of some ornamental oak and elm trees growing on the plaintiff's land, which overhung the defendant's land, and in part also overhung some of his farm buildings. The defendant did not enter upon the plaintiff's land for the purpose of cutting the branches, and he cut, or intended to cut, no more than what actually encroached upon his land. The plaintiff thereupon commenced this action, claiming (*inter alia*) damages for the wrongful cutting of such branches.

On 11 February, 1894, KEKEWICH, J., gave judgment for the plaintiff for 5*l.* damages, with costs on the High Court scale, holding that the defendant had no right to abate a mere nuisance of omission arising on his neighbour's land, and not causing danger to life, health, or property, without giving the owner of the land reasonable notice and requiring him to abate it. The defendant appealed.

Marten, Q.C., and J. Bradford, for the appellant :

We have a right to cut the branches without notice : *Norris v. Baker* (1).

(1) 1 Roll. Rep. 393-4 : 3 Bulstr. 198 ; sub nom. *Morrice v. Baker*.

[LINDLEY, L.J. : The only question is whether notice is necessary.]

Penruddock's case (2) has no bearing on the present, for there the mischief was done once for all. No notice is required if you can abate the nuisance without going on your neighbour's land: *Pickering v. Rudd* (3) recognizes the right to remove without notice. The cases relied on by KEKEWICH, J., were cases where it was necessary to go on the adjoining property.

The maxim, *Cujus est solum ejus est usque ad cælum*, is applicable. A neighbour has no right to impose the burden of giving notice.

[They also cited *Jones v. Williams* (4), *Lonsdale v. Nelson* (5), and Pollock on Torts, 3rd edit. pp. 369, 370.]

Secondly, even if ordinarily notice is required, this was a case of emergency. There was danger of falling branches doing damage to the farm buildings.

Warmington, Q.C., and *R. F. Norton*, for the respondent :

The defendant has committed a trespass. To cut the plaintiff's trees at all was a trespass, because the trees, wherever they are, are part of the plaintiff's land.

[KAY, L.J. : If that were so the defendant could not cut them even after notice.]

The defendant has, moreover, cut too much by several inches.

There is no authority for the proposition laid down by BEST, J., in *Lonsdale v. Nelson* (5), that the case of overhanging trees is an exception to the rule that notice is necessary before abating a nuisance of omission. *Jones v. Williams* (4) does not support that statement. If the exception exists, it applies only to the person who planted the tree, which is an act of commission. We did not plant these trees. Except in cases of emergency notice is necessary.

[They also cited *Holder v. Coates* (6).]

(2) 5 Co., 100 b.

(3) 1 Stark. 56; 4 Camp. 219.

(4) 11 M. & W. 176; 12 L. J. Ex. 249.

(5) 2 B. & C. 302.

(6) 1 Moo. & Malk. 112.

Marten, Q.C., in reply :

The age of the trees makes no difference ; for the roots and branches are always altering, so that no easement can be claimed.

[He cited *Masters v. Pollie* (7), *Burling v. Read* (8), *Chadwick v. Trower* (9) ; and *Wandsworth Board of Works v. United Telephone Co.* (10).]

Cur. adv. vult.

May 8.

LINDLEY, L.J. : The plaintiff and the defendant in this case are adjoining landowners. Some old trees situate on the plaintiff's land had branches which projected over the defendant's land. The defendant cut off so much of these branches as projected over his land, and he did so without going on to the plaintiff's land, and without previous notice to him. The question is whether the defendant was justified in so doing. Mr. Justice KEKEWICH thought not, and gave the plaintiff judgment for 5*l.* and costs, and from this judgment the defendant has appealed.

There is some controversy as to whether the defendant did not cut rather more than he himself says he did, and more than he seeks to justify. But the evidence is clear that he certainly did not intend to cut more than so much of the branches as overhung his land, and the evidence is not sufficient to prove that he did in fact cut more. Having noticed this matter, I pass it over without further comment ; for the action was not brought for such a trumpety purpose as to obtain damages for the wrongful cutting of two or three inches too much. The action was brought to obtain a declaration that the defendant had no right to cut the branches at all, or at all events no right to cut them without previous notice to the plaintiff and a request to him to cut them, and noncompliance by the plaintiff with that request.

It was contended on behalf of the plaintiff that having regard to the age of the trees and of the projecting branches, he had acquired a right to the exclusive possession of so much of the space above the defendant's soil as the branches actually filled ;

(7) 2 Roll. Rep. 141.

(8) 11 Q. B. 904 ; 19 L. J. Q. B. 291.

(9) 3 Bing. N. C. 334 ; 6 Bing. N. C. 1.

(10) 13 Q. B. D. 904 ; 53 L. J. Q. B. 449 ; 51 L. T. 148 ; 32 W. R. 776.

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and that either under the Statute of Limitations or by prescription the plaintiff had a right to keep the branches where they had grown. It was contended that if a man erected on his own land something which projected over his neighbour's land, and it remained undisturbed for a sufficient length of time, his neighbour could not remove it, nor maintain any action in respect of it. This is true. But to plant a tree on one's own land infringes no rights; and if the tree grows over the soil of another I cannot discover that any action lies for the encroachment unless damage can be proved. I can find no authority for the proposition that an action of trespass would lie in such a case, and it is plain that Lord ELLENBOROUGH did not think it would: see *Pickering v. Rudd* (3). According to our law the owner of a tree which gradually grows over his neighbour's land is not regarded as insensibly and by slow degrees acquiring a title to the space into which its branches gradually grow. This is the view taken in the third edition of Gale on Easements, to which reference will be made presently. Considering that no title is acquired to the space occupied by new wood, and that new wood not only lengthens but thickens old wood, and that new wood gradually formed over old wood cannot practically be removed as it grows, and considering the flexibility of branches and their constant motion, it is plain that the analogy sought to be established between an artificial building or projection hanging over a man's land and a branch of a tree is not sufficiently close to serve any useful purpose. The argument to which I am referring had the charm of novelty; but it is quite inconsistent with the authorities to which I will refer presently; and no Court can introduce by judicial decision a perfectly new mode of acquiring a title to land or to a portion of the space above it.

The right of an owner of land to cut away the boughs of trees which overhang it, although those trees are not his, is too clear to be disputed. This has been declared to be the law for centuries: see Bro. Ab., Nusans, 28; *Norris v. Baker* (1); *Pickering v. Rudd* (3); *Crowhurst v. Amersham Burial Board* (11); and there is no trace of the age of the tree or its branches being a material circumstance for consideration. Nor did Mr. Justice KEKEWICH intimate any

doubt upon the law up to this point. He, however, held that notice ought to be given to the owner of the tree before it was interfered with, and the real question is whether notice is required by law. The authorities to which I have referred do not allude to the necessity of notice. In *Pickering v. Rudd* (3), which was an action for cutting the plaintiff's Virginian Creeper, the plea contained no averment of notice, and the plaintiff did not demur, but new assigned, and alleged an excessive cutting. Lord ELLENBOROUGH held that the only question was whether the defendant had exceeded his right by cutting too much. Again in *Chitty on Pleading*, 6th edit., vol. iii., p. 1018, a form of a plea justifying the lopping of overhanging branches is given, and there is no averment of notice to the owner of the tree. In the 7th edition, vol. iii., p. 364, such an averment is introduced, and reference is made to *Jones v. Williams* (4). *Jones v. Williams* was not a case of cutting trees; but it is the leading authority on the right to abate nuisances without notice; and it was decided that a person who suffers from a nuisance on another person's land can enter upon that land and abate that nuisance without notice if the person in possession of the land himself created the nuisance, or in case of emergency; but that in other cases notice to the person in possession, and a request to him to abate the nuisance, and non-compliance with that request, are necessary to justify the entry and the abatement of the nuisance by the person aggrieved by it. This is what the case decided, and so far the decision only applies to what one man may do on another man's land. It does not show what a man may or may not do on his own land. But in *Jones v. Williams* (4), Baron PARKE, who delivered the judgment of the Court, referred to a case in *Jenkins*, 260, and to *Penruddock's case* (2), as authorities for the proposition that an owner of land cannot, without notice, remove the overhanging eaves of a neighbour's house erected by a former owner through whom the neighbour had acquired title by feoffment. The reason of this doctrine is not explained, but assuming it to be correct as regards an overhanging house or eaves, it does not follow that it applies to the overhanging branches of a tree.

The judgment of Mr. Justice BEST in *Lonsdale v. Nelson* (5) is explicit that overhanging trees may be lopped by the owner of land

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over which they hang without notice. Mr. Justice BEST says the right so to lop them is an exception to the general rule, which requires notice before a nuisance not created by the owner of what creates it can be abated by a person injured by it. He is not alluding to a case of emergency, for in such a case no notice need ever be given. He refers to such cases afterwards. [The Lord Justice read part of the passage set out below, p. 122, and continued:] What I have above said respecting the right to cut branches is equally true with respect to the right to cut roots: see Gale on Easements, 3rd edit. pp. 419–420. “There appears to be no authority in the English law, that, in the absence of express stipulation, an easement can be acquired by user, to compel a man to submit to the penetration of his land by the roots of a tree planted in his neighbour’s soil.

“The principal objections to the acquisition of such an easement consist in the secrecy of the mode of enjoyment, and the perpetual change in the quantity of inconvenience imposed by it.

“Supposing no easement to exist, there seems nothing to take this out of the ordinary rule, that a man may abate any encroachment upon his property, and therefore that he may cut the roots of a tree so encroaching, in the same manner that he may the overhanging branches.” This passage has the authority of the late Mr. W. H. WILLES, the Judge of the Bristol County Court, who edited the edition from which I have read the foregoing extract.

The law on this subject is, in my opinion, as follows: the owner of a tree has no right to prevent a person lawfully in possession of land into or over which its roots or branches have grown from cutting away so much of them as projects into or over his land; and the owner of the tree is not entitled to notice unless his land is entered in order to effect such cutting. However old the roots or branches may be, they may be cut without notice, subject to the same condition. The right of an owner or occupier of land to free it from such obstructions is not restricted by the necessity of giving notice so long as he confines himself and his operations to his own land, including the space vertically above and below its surface.

The defendant contended that he was justified in cutting the plaintiff’s trees because they were in imminent danger of falling;

but this is not proved, and my judgment is not based on grounds of urgency.

The appeal therefore must be allowed, and judgment must be entered for the defendant.

LORES, L.J.: That the defendant had a right to cut the boughs of the plaintiff's trees which projected over his land is beyond question, but whether he was justified in so doing without giving the plaintiff previous notice is a matter that requires consideration. I am of opinion that he was.

It was argued that, the branches of the plaintiff's trees having for a long time overhung the land of the defendant, the plaintiff had acquired a right to the occupation of so much of the space as was covered by the projecting boughs, either by the Statute of Limitations or by prescription. There is no authority for such a contention, and in no previous case (of which there are many) where the question of overhanging boughs has been considered, was it ever suggested.

In *Pickering v. Rudd* (3) Lord ELLENBOROUGH said: "Whether the action can be maintained does not depend upon the length of time for which the superincumbent air is invaded."

And again, 3rd edit. of Gale on Easements, p. 419. [The Lord Justice read the passage set out above, p. 116, and continued:] I assume therefore, as no easement exists, and as no right is acquired under the Statute of Limitations, that there is nothing to take the case of encroaching trees out of the ordinary rule that a man may abate any encroachment upon his property, and that his right to cut the branches or roots projecting into his land is incontestable. But can this be done without previous notice to the person to whom the offending tree belongs?

I answer the question in the affirmative. In my judgment, the adjoining owner is, without any previous notice, entitled to cut as much of the tree as encroaches upon his land (whether it be branches or roots), provided in so doing he does not enter or trespass on the land of the owner of the tree, and confines himself to his own land. There is direct authority to this effect: *Pickering v. Rudd* (3) was (amongst other things), an action for breaking, lopping and damaging a Virginian Creeper, which grew in the

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plaintiff's garden and spread itself over the defendant's house. The defendant cut away that portion of the creeper which was over his house, without touching the surface of the plaintiff's premises. The defendant justified the cutting on the ground that the creeper was unlawfully spreading over his house, and that he removed it because it was an incumbrance on his premises; the plaintiff replied that the defendant had used greater force than was necessary. There was no suggestion that previous notice to the plaintiff was necessary before the defendant was justified in cutting the creeper. Lord ELLENBOROUGH says: "The defendant justifies the removal of the tree as being noxious to his premises; the plaintiff, by his replication, admits it to have been mischievous to some extent, and the issue is, whether the defendant used more force than was necessary. The plaintiff admits a breaking to be necessary, and therefore it cannot now be drawn into question whether a breaking was necessary or not." There are observations in the judgment of Mr. Justice BEST in *Lonsdale v. Nelson* (5) which strongly confirm the view I take with regard to the non-necessity of notice. The learned Judge is drawing a distinction between nuisances caused by an act of commission and those caused by omission. [The Lord Justice read part of the passage set out below, p. 122, and continued:] Mr. Justice BEST clearly does not consider any notice necessary in the case of overhanging branches. I thought at first the learned Judge was referring to cases where there was danger to life or property, cases of emergency, but that is not so, for his subsequent remarks show that he considers notice unnecessary in all cases of nuisances arising from omission, if there is any emergency.

Jones v. Williams (4) was relied upon by the plaintiff, but in that case the defendant entered upon the land of the plaintiff, which distinguishes it from the case now under consideration. In that case it was held that a party has no right to enter upon the land of another in order to abate a nuisance of filth, without a previous notice to the owner of the land to remove it, unless it appears that the latter was the original wrong-doer by placing it there, or that it arises from a default in the performance of some duty or obligation

cast upon him by law, or that the nuisance is immediately dangerous to life or health.

The case of trees was not noticed in the judgment, but it is to be observed that *Erle*, who argued for the plaintiff, at the end of his argument says, "The only case in which, according to the authorities, a notice or request is unnecessary, is that of trees overhanging a highway, the reason being that anyone may lawfully stand there to cut them." The distinction in my judgment is this: a man may without previous notice, cut the boughs of his neighbour's trees which overhang his land, if he can do so without trespassing on his neighbour's land, but he cannot justify a trespass on another's land for the purpose of cutting boughs or roots projecting into his own lands, without previous notice.

It was suggested in this case that the boughs could not have been cut without some trivial trespass on the plaintiff's land, but if there was any trespass, which is doubtful, it was unintentional and of the slightest kind. The action was not brought in respect of any such trespass, but in order to test the right to cut the trees. However, as there is always some risk of committing a trespass in removing overhanging boughs, it is a wise precaution to give notice. The appeal must be allowed.

KAY, L.J. : This is an action for damages for cutting boughs of the plaintiff's trees. The trees are large oaks and elms of great age, and the boughs overhang the land of the defendant. They were cut off by the defendant without any previous notice to the plaintiff.

What is the legal position when trees growing on the land of A. extend their roots and boughs into and over the adjoining land of B.? It was argued that it is the same as if A. had built a house on the edge of his own land with cellars within the land of B., or a projecting upper storey extending over B.'s land. But in that case B. might bring against A. an action of trespass or ejectment. Would trespass or ejectment lie against the owner of the trees?

In the case of the house, there is an occupation by A. of B.'s land to the extent of the encroachment, and this by lapse of time may grow into a right, and in such a case by the ordinary rule an action will lie without any proof of damage. Is the extension by natural

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growth of the roots or boughs of a tree into or over the land of another, an occupation of that land which can become a right by lapse of time? Or is this encroachment simply a nuisance, and if so, can it be abated by the owner of the land encroached on? If it can, must he before abating it give notice to the owner of the tree? It is argued, that when the boughs or roots can be cut without entering upon the land of the owner of the tree, notice should not be necessary. The owner of the land encroached upon has a right to use his own land either by digging in the soil or by building upon it, and if there be roots or boughs in the way, he should be allowed to remove them without notice to anyone.

On the other hand, it is said, notice is necessary in all cases before a nuisance can be removed, except when the occupier of the adjoining land has himself caused the nuisance, and except when an emergency happens, and there is danger to life or health or property, and no time to give notice. It may be that roots and boughs may be cut without entering upon the adjoining land on which the tree stands, but the roots and boughs belong to the owner of the trees, and to cut them is to interfere with his property. It is reasonable, and more likely to promote good feeling between neighbours, that notice should be given before cutting, in order, as was said in *Lonsdale v. Nelson* (5), that the owner may have an opportunity of removing the encroachment himself.

It is necessary to examine carefully the authorities on that question. In Brooke's Abr., *Nusance*, pl. 28, it is stated *per* Keble, that a man is not bound to lop a tree which encumbers a roadway, "chemin," and therefore it should seem that another (that is, I suppose, someone not the owner of the tree) may do it. But nothing is said there about notice. Keble was not a Judge. This, therefore, is a statement by counsel accepted by the reporter as law. In Hale, *De Portibus Maris*, 1 Hargrave's Tracts, p. 87, "Any man may justify the removal of a common nuisance, either at land or by water, because every man is concerned in it," and he instances a case of the burgesses of Southampton justifying the throwing down of a weir in a creek of the sea which hindered the navigation; "but," he continues, "because this many times occasions tumults

and disorders, the best way to reform public nuisances is by the ordinary Courts of Justice."

In 20 Vin. Abr., under the head "Trees—(E) Disputes between Neighbours," I find: "If trees grow in the hedge, and the fruit falls into another's ground, the owner may go in and take it If the boughs of your trees grow out into my land I may cut them. *Per CROKE, J.*, Roll. Rep. 394, pl. 15. Trin. 19 Jac. B.R." "S. P. *per CROKE, J.*, 3 Buls. 198." "A tree grows in A.'s close, and roots in B.'s, yet the body of the main part of the tree being in the soil of A., all the residue of the tree belongs to him also. 2 Roll. Rep. 141; Hil. 17 Jac. B.R. *Masters v. Pollie*." Then is added in a note: "But if it grows in a hedge which divides the land of A. and B., and the roots take nourishment of both their lands, it was adjudged they are tenants in common of it. 2 Roll. Rep. 255; Mich. 20 Jac. B.R. Anon." This shows that the roots, though in another man's land, belong to the owner of the tree, and it is only when the tree is on the boundary line, so that the trunk is partly in the land of each of the adjoining owners, that they become joint owners of the tree: see *Holder v. Coates* (6).

I have examined the authorities referred to in Viner. The *dictum* by CROKE, J., 1 Roll. Rep. 394, is this: If the boughs of your tree "excesce en mon terre, jeo poio eux succider, mes jeo ne poio justefier le succider de eux devant ils excesce en mon terre pur timor del' excescer."

In *Pickering v. Rudd* (3), nailing a board to a wall so that the board overhung the land of another was held not to be a trespass, Lord ELLENBOROUGH saying, "I do not think it is a trespass to interfere with the column of air superincumbent on the close." He intimates that firing a gun so that the shot would strike the soil of another would be a trespass, but he doubts whether firing across another's land where the soil was not touched, or the passage of a balloon over the land, would be trespass, and says that if any damage was occasioned by the board there would be an action on the case.

In order to place the board the defendant cut away a Virginian Creeper which grew in the plaintiff's garden, and spread over the side of the defendant's house. He managed to do this, the report states, by means of ropes and a scaffolding suspended over the

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plaintiff's garden without touching the surface of the plaintiff's premises. There was no statement in the pleadings or evidence, so far as appears, that notice had been previously given of the intention to cut. Under the direction of Lord ELLENBOROUGH, who said that it was admitted on the record that some damage had been done by the continuance of the trees, and that the question was, whether in removing the mischief the defendants had done any damage to the tree which might have been avoided, there was a verdict for the defendant, and in the ensuing term the King's Bench refused to grant a new trial.

In *Fay v. Prentice* (12) it was clearly intimated that if a man were to erect any building overhanging the land of another an action of trespass, in which it is not necessary to show damage, would lie; but where an action on the case is brought instead to recover damages for the nuisance thereby occasioned, it is necessary to show damage to support the action.

In *Penruddock's case* (2) the question was, whether a writ of *quod permittat prosternere* would lie for the feoffee of a house to which a nuisance was being committed by the drip from an adjoining house which had been built before the feoffment to him, and was in the possession of an assign of the person who built it, and it was held it would, because this was a continuing nuisance, and it seems to have been held that he might himself abate the nuisance.

In *Lonsdale v. Nelson* (5) Mr. Justice BEST states the law thus: "Nuisances by an act of commission are committed in defiance of those whom such nuisances injure, and the injured party may abate them, without notice to the person who committed them; but there is no decided case which sanctions the abatement by an individual of nuisances from omission, except that of cutting the branches of trees which overhang a public road, or the private property of the person who cuts them. The permitting these branches to extend so far beyond the soil of the owner of the trees is a most unequivocal act of negligence, which distinguishes this case from most of the other cases that have occurred. The security of lives and property may sometimes require so speedy a remedy as not to allow time to

call on the person on whose property the mischief has arisen to remedy it. In such cases an individual would be justified in abating a nuisance from omission without notice. In all other cases of such nuisances, persons should not take the law into their own hands, but follow the advice of Lord HALE, and appeal to a Court of Justice."

In that case the action was for trespass in entering the land of the plaintiff. It was attempted to justify it by pleading that the entry was for the purpose of repairing an ancient building necessary for the maintenance of a port partly within the plaintiff's land. It was held that before such entry notice should have been given, in order that the plaintiff might have an opportunity to do the repairs himself rather than suffer the intrusion of strangers.

It is not quite clear from the language of Mr. Justice BEST whether a man may lop the boughs of his neighbour's trees, so far as they extend over his land, without notice, except in case of some emergency occasioning danger to life or property. The judgment contains several important propositions: (i.) The overhanging of the boughs of a neighbour's tree is a nuisance occasioned by omission; (ii.) Where a nuisance is occasioned by an act of commission, the person injured may abate the nuisance without notice to him who actually committed the nuisance while he is in possession; (iii.) So where the security of life or property is in danger, and there is no time to give notice, the person injured may abate a nuisance occasioned by an omission; (iv.) In all other cases of nuisances by omission Mr. Justice BEST's opinion seems to be that the individual injured must not himself abate the nuisance, but should appeal to a Court of Justice. The abatement of a nuisance occasioned by the overhanging boughs of trees is stated to be the only other case in which the injured person may abate the nuisance himself. But it is not distinctly said that he may do so without notice, except in a case of emergency where there is no time to give such notice.

Jones v. Williams (4) was an action of trespass for entering the plaintiff's dwelling-house. The defendant pleaded that the plaintiff injuriously and wrongfully permitted filth to accumulate on his premises, and that the defendant entered to abate this nuisance. After verdict for the defendant the plaintiff applied for judgment

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non obstante veredicto, and he obtained it, the plea being held bad because it did not state whether the plaintiff himself placed the filth on his premises, or whether it was placed by another and he omitted to remove it; nor did it state that the plaintiff was under any obligation to remove it, and it did not aver a previous notice to the plaintiff. The Court decided: (i.) That if the plaintiff had placed the filth there himself the defendant might enter and remove it without notice. (ii.) So, possibly, if there was any obligation on the plaintiff to remove it by custom or otherwise and he did not. (iii.) But if the filth was placed there by another, and the plaintiff succeeded to the possession of the *locus in quo* afterwards, notice would be necessary before the defendant could enter to remove it. The judgment of Baron PARKE continues thus: "We do not rely on the decision in *Lonsdale v. Nelson* (5) as establishing the necessity of notice in such a case, for there much more was claimed than a right to remove a nuisance, viz. a right to construct a work on the plaintiff's soil, which no authority warranted; but Lord WYNFORD's dictum is in favour of this objection, for he states that a notice is requisite in all cases of nuisance by omission, and the older authorities fully warrant that opinion where the omission is the non-removal of a nuisance erected by another. *Penruddock's case* (2) shows that an assize of *quod permittat prosternere* would not lie against the alienee of the party who levied it without notice. The judgment in that case was affirmed on error, and in the King's Bench, on the argument, the judges of that Court agreed that the nuisance might be abated, without suit, in the hands of the feoffee; that is, as it should seem, with notice." And for confirmation of this his Lordship refers to Jenkins's Sixth Century, where the case is so stated, and notice before abatement is said to be necessary. He concludes that a notice or request is necessary in the case of a continuance of a nuisance by an alienee of the property, and that the plea was bad; and Lord ABINGER added a few exceptions where there was such immediate danger to life or health as to render it unsafe to wait to give notice. It is significant that in the report of Lord WENSLEYDALE's judgment in *Jones v. Williams* (4) in the Law Journal he is stated to have read Lord WYNFORD's dictum as having excepted the case of cutting the boughs of overhanging trees as a

nuisance which might be abated without notice. In the report of *Jones v. Williams* (4) in Meeson and Welsby this reading of Lord WYNFORD's *dictum* is omitted. It would appear that on further considering the words Lord WENSLEYDALE was not satisfied that this was their true meaning.

The result of the authorities seems to be this. The encroachment of boughs and roots over and within the land of the adjoining owner is not a trespass or occupation of that land which by lapse of time could become a right. It is a nuisance. For any damage occasioned by this, an action on the case would lie. Also the person whose land is so affected may abate the nuisance if the owner of the trees, after notice, neglects to do so. Whether he may do so without notice is not stated distinctly in any of the cases, but on the whole I think that this is the meaning. In the older cases it is said that the owner of the land encroached on may cut the boughs, and nothing is said about giving previous notice; and I think that the true reading of *Pickering v. Rudd* (8) is that he may do so without notice if he can do it without trespassing upon the land in which the tree grows.

I come very reluctantly to this conclusion. I think the legal question very doubtful. In my opinion it would be better if the law were that, before cutting a neighbour's trees, notice should be given, in order to afford to the owner of the trees an opportunity of removing the boughs which occasion a nuisance. Whether that is the law or not, no one but an ill-disposed person would do such an act without previous notice.

Appeal allowed (13).

Solicitors: *Walter Webb & Co.*, for the Appellant.

Broughton, Nocton & Broughton, for the Respondent.

(13) The House of Lords on 27 November, 1894, affirmed this decision.

IN RE ARMITAGE, ARMITAGE v. GARNETT.

1898, August 4. LINDLEY, LOPES AND A. L. SMITH, L.JJ.

Tenant for Life and Remainderman—Capital and Income—Trust of Shares in Trading concern—Direction that no part of Income is to be retained as Capital—Liquidation—Sale of undertaking—Surplus over Amount paid up on Shares.

A direction in a will that all income produced by the testator's estate in its actual condition for the time being shall be applicable as income, no part thereof being in any event liable to be retained as capital, does not entitle a tenant for life of shares in a trading concern, which has been sold, to the surplus which remains, after satisfying the amount actually paid up on the shares in the undertaking.

APPEAL from the decision of the late Vice-Chancellor Bristowe.

E. Armitage, by his will made in November, 1886, devised and bequeathed his residuary estate to trustees upon trust for sale and conversion, and directed them to hold the proceeds upon trust as to one-third part for Mrs. Garnett for life, and after her death upon trust for certain persons in remainder as therein mentioned. The testator empowered his trustees to postpone the sale and conversion, and declared that all income produced by his estate in its actual condition for the time being should be applicable as income under the trusts of the will, no part thereof being, in any event, liable to be retained as capital, but that no property not actually producing income, which should form part of his estate, should be treated as producing income, or as entitling any party to the receipt of income.

Part of the testator's residuary estate consisted of 4,450 shares of 10*l.* each, upon which 8*l.* per share had been paid up, in Sir Elkanah Armitage & Sons (Limited).

The articles of association of the company provided for the establishment of a reserve dividend fund, to which surplus profits over ten per cent. were to be carried until the fund amounted to 30,000*l.*, and recourse was to be had to the fund in any year when profits available for dividends were less than five per cent. to make up the deficiency. At the date of the winding up the reserve fund stood at 20,194*l.* 11*s.*, which, if distributed, would represent a dividend of 14*s.* 5*d.* per share.

In 1890 the company went into voluntary liquidation, and a new company was formed for the purpose of acquiring their undertaking. The purchase-money paid for the sale of the undertaking, when distributed amongst the shareholders of the old company, gave a surplus of 1*l.* 5*s.* 6*d.* over and above the amount of capital paid up per share.

This action was brought in the Chancery Court of the County Palatine of Lancashire, to determine whether the surplus of 1*l.* 5*s.* 6*d.* per share was, as between the tenant for life and remaindermen, to be regarded as capital or income.

The Vice-Chancellor held that the 1*l.* 5*s.* 6*d.* was to be regarded as income, and that the tenant for life was accordingly entitled to one-third of the surplus in respect of her interest in the residue.

Levett, Q.C., and *Sebastian*, for the remaindermen :

- (i.) The whole of the surplus is capital.
- (ii.) So much of the surplus as represents the dividend reserve fund ought not to go to the tenant for life. The tenant for life is not entitled to profits until they are divided as dividends.

Byrne, Q.C., and *Maberly*, for the tenant for life :

The profits retain their character of income until the company has capitalized them.

Parker, for the trustees of the will.

LINDLEY, L.J. : I feel no difficulty in this case. In my opinion the Vice-Chancellor has made a mistake. The question is, who is entitled to a sum of 1*l.* 5*s.* 6*d.* per share on a large number of shares belonging to the testator? The short effect of the will is, that these shares are held by the trustees, upon trust to pay the income to the tenant for life, and the question which the Court has to determine is, whether this 1*l.* 5*s.* 6*d.* is income within the meaning of the trust. The company is being wound up, and the assets of the company are distributable among the shareholders, who get this 1*l.* 5*s.* 6*d.* in addition to their capital. After the commencement of the liquidation, all power of declaring dividends is at an end. It is true that this surplus is profit, because it is the difference between what was put into the concern and what is got

out of it. But is it income to which a tenant for life is entitled? Clearly not. The testator did not mean the tenant for life to have the profits arising on a realization of the assets; he meant her to have only such profits as should be declared as dividends or bonus. This view is perfectly in accordance with the decision of the House of Lords in *Bouch v. Sproule* (1), which has at last put a rational interpretation on a great number of cases which have been decided on this subject. The appeal must be allowed.

LCPES and A. L. SMITH, L.JJ., concurred.

Appeal allowed.

Solicitors: *Grundy, Kershaw, Saxon, Samson & Co.; Busk & Mellor.*

(1) 12 App. Cas. 385; 56 L. J. Ch. 1037; 57 L. T. 345; 36 W. R. 193.

BUNTING v. HICKS.

1894, March 3, 5, 13. LINDLEY, KAY AND A. L. SMITH, L.JJ.

Riparian Proprietors—Water-course—Defined Channel—Continuous and apparent Easement—Diversion of Water—Injunction.

The plaintiff and defendant were owners of lands formerly belonging to the same person. A stream of water had for many years originated in a spinney on the defendant's land, and had flowed down in a defined channel to and through the plaintiff's land into a brook. The conveyance of the plaintiff's land expressly included all easements and water-courses "appertaining to" the land conveyed. An injunction was granted to restrain the defendant from diminishing the flow of water down the stream by abstracting water from the springs that fed the stream, on the ground either that there had been an implied grant to the plaintiff of a continuous and apparent easement, or that he had the right of an ordinary riparian owner to the flow of an ancient stream.

Dudden v. Clutton Union (1) applies under the circumstances, and not *Broadbent v. Ramsbotham* (2).

APPEAL by the plaintiff from a judgment of Kekewich, J., dated 11 August, 1893.

The action was brought by the plaintiff, who was the owner of property through which a stream of water flowed, against the defendant, who was the owner of property higher up upon the same stream, for abstracting considerable quantities of water therefrom for brick-making purposes, whereby the flow of water through the plaintiff's land was greatly diminished. The defendant had constructed on the lower side of a spinney which was situated upon his land a large pond, into which was collected the water which rose in that spinney and which had flowed thereout and found its way to the land of the plaintiff. From the water thus collected in this pond the defendant carted away the water at the rate of about thirty cartloads a day. The learned Judge decided in favour of the defendant.

The plaintiff appealed.

Chester, for the appellant.

Renshaw, Q.C., Douglas Walker, Q.C., and Jason Smith, for the respondent.

Cur. adv. vult.

(1) 1 H. & N. 627; 26 L. J. Ex. 146.

(2) 11 Ex. 602; 25 L. J. Ex. 115; 4 W. R. 290.

March 13.

LINDLEY, L.J.: In 1877 the lands owned by the plaintiff and the defendant belonged to the same person, who sold them in two lots. The plaintiff's predecessor bought one lot, consisting of pasture and arable land, situate at a lower level than the other lot, which was afterwards bought by the defendant's predecessor. There was, and had been for many years, a stream of water, originating in a spinney on the defendant's land and flowing down in a defined channel to and through the plaintiff's land into a brook. This stream was and had been used for many years for watering cattle turned into three at least of the pastures bought by the plaintiff, and was, so far as I can see, necessary for the beneficial enjoyment of these pastures. The conveyance to the plaintiff's predecessor expressly included all easements and watercourses "appertaining to" the land conveyed; but the words "or usually enjoyed therewith or reputed as part thereof or appurtenant thereto" were not inserted. The watercourse in question was not an easement in any proper sense whilst the lands in which the stream originated and through which it flowed belonged to one and the same owner; but it is, in my opinion, clear that after the conveyance to the plaintiff's predecessor the vendor could not have cut off this stream and have deprived the purchaser of the benefit of its flow. (See *Watts v. Kelson* (3), and *Wheeldon v. Burrows* (4), in which *Pyer v. Carter* (5) was explained and put on the right footing.) [His Lordship read and commented on the judgment of the Court in the case of *Watts v. Kelson* (3), and continued:] But it is said that the stream was only a drain from the spinney, and that the vendor and those claiming under him could alter the mode of draining the spinney and were not bound to leave the water coming from it to flow in its old accustomed channel. But this argument assumes that there is no implied grant of any right to the water coming from the so-called drain, and the doctrine invoked by the defendant is wholly inapplicable to such a stream as this. The early history of this stream and of its origin is lost in obscurity. The evidence shows that the spinney to which I have referred is, and has been as long as any one can remember, full of

(3) L. R. 6 Ch. 166; 40 L. J. Ch. 126; 24 L. T. 209; 19 W. R. 338.

(4) 12 Ch. D. 31; 48 L. J. Ch. 853; 41 L. T. 327; 28 W. R. 196.

(5) 1 H. & N. 916; 26 L. J. Ex. 258; 5 W. R. 371.

springs, which can be seen bubbling up. These springs first fill some ponds, and then, being on the side of a slope, run down, and they run down, not in a multitude of streamlets, but in one defined channel, and they have so run as long as any one can remember. There is some evidence to show that fifty years ago the stream thus formed entered a stone culvert and flowed out of it on to the hill-side. But in 1849 a railway was made crossing this stream, and the old culvert was then destroyed and the stream was carried for some distance along the bottom of the railway bank and then under the railway into the channel of another watercourse flowing by the pastures which are now the plaintiff's, and so into the brook already referred to. There is also evidence to show that where these springs come up, and for some distance round and below them, there was formerly a bed of gravel, which has been dug out. It is contended that the removal of this gravel has made the springs artificial springs, and that they ought to be regarded as so many wells sunk by the defendant's predecessor in title, and from which the defendant can therefore take water in any quantities and for any purposes he likes. I am quite unable to take this view of the case. It may be that the places where the springs now come to the surface are not the same as those where the water escaped when the gravel bed was still undisturbed. But, assuming this to be so, the springs must then have existed and overflowed somewhere, and there is no reason to suppose that there is any material difference between the present and former state of things on the defendant's side of the railway so far as the springs and the stream caused by their overflow are concerned. At all events, there is nothing like proof of any such difference. Mr. Justice KEKEWICH took the same view of the evidence on this point as I do myself. But I differ from him with respect to what has been done before the stream issues from the defendant's land. In my opinion the defendant has diminished the flow of water down the stream by abstracting water from the springs which feed that stream. There is no boggy or spongy ground between the springs and the stream which the defendant is entitled to drain as he likes. The defendant's own plan shows that there is a defined stream from the highest spring. Under these circumstances, in my judgment this case is governed by *Dudden v. Clutton Union* (1), and not by *Broadbent v. Ramsbotham* (2). The conclusion thus arrived at entitles the plaintiff to an injunction, either on the ground of an

(LINDLEY, L.J.)

implied grant, to which I first alluded, or on the ground that he has the rights of an ordinary riparian owner to the flow of an ancient stream. The appeal must therefore be allowed, with costs here and below, and an injunction must be granted as in *Watts v. Kelson* (3).

KAY, L.J.: In the land of the defendant there is a spring of water. It arises in two small ponds situate in a spinney, which contains some large trees. There are two or three ponds in the spinney connected by a defined channel. Part of the spinney is boggy ground, from which some water also runs into these two ponds. But the main sources consist of springs in the two ponds, where, as the witnesses say, the water may be seen boiling up. From the westernmost of these two ponds the water runs by a defined channel into the other pond, and thence into a third pond outside the spinney, and from this third pond it runs in a defined channel, which it has worn in the ground, in an easterly direction as the land slopes down to the Great Northern Railway, which, running north and south, crosses the direction of the stream. The railway was made in 1847, and the stream was then diverted on the western side of the line by an artificial ditch, which carried it parallel with the railway into a culvert formed underneath the railway to take this water and also the water of a ditch called on the defendant's plan "open grip." Beyond this culvert it runs down the grip on the plaintiff's land and feeds a pond in a pasture belonging to the plaintiff.

This state of things has existed from 1847, when the railway was made, and is very clearly delineated on the defendant's plan put in evidence in the action. The spring in the spinney has existed for a long time, certainly more than sixty years, and there is no evidence as to the date of its origin. Long ago, it is said, there was a stone culvert from the spring in the course of the present stream, across where the railway now is, coming to the surface in a field east of the line, which now is part of the plaintiff's property. From the outlet of the culvert in the field one witness says that the water had no definite channel, but spread over the surface of the field. This stone culvert no longer exists, and the water now runs down to the railway in a channel which it has worn for itself, and it is found by the learned Judge that from the third pond, which is outside the

spinney, down to the railway it is a natural stream. But the learned Judge, if I rightly understand his judgment, seems to hold that, although the defendant could not cut off or divert the water from this stream, he may take it from the third pond, which he considers no part of the stream. I find it difficult to agree with the view which the learned Judge has taken of the facts. With deference to his opinion, I think that the stream begins in the westernmost part of the ponds in the spinney where the spring first rises, and, treating it as a natural stream and spring, the defendant can no more take all the water from the spring, or from any part of its course after it appears above ground, than he could take it from the channel east of the third pond outside the spinney. This, if authority is wanted, was clearly decided in *Dudden v. Clutton Union* (1), where sinking a tank at the source of a stream and conveying the water thence by pipes was treated as a wrongful act, just as though the water had been diverted from the stream lower down. But the case has not been argued before us upon this ground at all. The stress of the argument has been that the spring and stream are not natural, but artificial, and that therefore the defendant has a right to appropriate all the water. If the fact were so, I should demur to the conclusion on two grounds. First, it is not the law that the owner of land in which water flows through an artificial channel can appropriate all such water. The contrary was decided in *Wood v. Waud* (6), where the law is stated thus: "The proposition, that a watercourse, of whatever antiquity, and in whatever degree enjoyed by numerous persons, cannot be enjoyed so as to confer a right to the use of the water, if proved to have been originally artificial, is quite indefensible; but, on the other hand, the general proposition, that, under all circumstances, the right to watercourses, arising from enjoyment, is the same, whether they be natural or artificial, cannot possibly be sustained. The right to artificial watercourses, as against the party creating them, surely must depend upon the character of the watercourse, whether it be of a permanent or temporary nature, and upon the circumstances under which it is created." Are this spring and watercourse of a temporary or permanent character, or were they created under

(6) 3 Ex. 748, 777; 18 L. J. Ex. 305.

(KAY, L.J.)

circumstances which give the defendant a right to divert them? There is no direct evidence when or how they originated, or whether they were created by man's agency at all. The theory presented is this. It is said that in a large hollow in the clay extending from somewhere west of the spring beyond the eastern side of the railway there lies a deposit of gravel. The land slopes gradually from west to east. This gravel, lying on a bed of clay, would naturally become filled with water, and when over full that water would issue somewhere on the slope and form a spring. But it is said a large area of this gravel-bed has been worked, extending from the west side of the spring beyond the line of the railway in an irregular oval. On the west side of the spring the land rises abruptly about five feet, and the westernmost point in the spring is on the base of that rise, being, it is suggested, the furthest point at which the gravel has been taken in that direction. This is all rather guess-work, but, assuming it to be true, the effect of so excavating the gravel may have been to cause the water to issue from the ground at a point more west than it would otherwise have done, and so to alter the position of the spring and lengthen the stream by the addition of that distance. But this does not make the character of the stream temporary in any sense, nor is there anything in these circumstances which can give the defendant the right to divert or destroy the stream or the spring. The excavation of gravel suggested, if it did take place, was more than sixty years ago. Large trees have since grown in the spring. The flow of water has been constant, except when in dry seasons it may have failed for a time, during all that period, and, in my opinion, even if these alleged facts are true, they afford no reason whatever for treating this spring and stream as other than a natural spring and stream for the purpose of determining the rights of the riparian owners to the flow from them.

Then it is argued that this is like the overflow of the well in *Broadbent v. Ramsbotham* (2), which the owner of the well was, it was held, at liberty to divert from the well. But the reason of that decision, right or wrong, was that the overflow never did run in a channel, natural or artificial, down to the brook on which the plaintiff was a riparian proprietor, and if any of the water ever

found its way to the brook it was after it had squandered itself over a swamp, and therefore the defendant was at liberty to intercept and divert it just as he might appropriate "water falling from heaven on the side of a hill" before it arrived at a defined natural watercourse. It is not necessary to decide what would have been the right of the plaintiff if the alleged stone culvert were still in existence and were carrying the water on to his land. But if the water was of use to him either for watering his cattle or irrigating the field in which this culvert came to the surface, I cannot see how the defendant could have any right to divert the water. The plaintiff would then claim it as the owner of the field in which the culvert came to the surface, not as riparian proprietor over the stream as it now exists.

So far, I have considered the case without reference to the manner in which the predecessors in title of the plaintiff and defendant acquired their respective properties. Before 1879 these properties belonged to the same person. In that year they were sold by auction in separate lots on the same day, and the plaintiff's predecessor bought the land east of the railway, the defendant's predecessor buying the land west of the railway, in which the spring and stream commence. The plan on the particulars of sale does not show the spring or stream, neither is it marked upon the plan on the conveyance to the plaintiff's predecessor. It is not mentioned in that conveyance, which contains only the general word "watercourse" which could apply to it.

But, although the law is now understood to be that upon a grant easements cannot be reserved over the land granted by implication without express words—*Wheeldon v. Burrows* (4)—it is otherwise as to implied grants of such easements as are continuous and apparent. The grantor cannot derogate from his grant, and a continuous and apparent easement passes by implication without express words. The law is the same where the servient and dominant tenements are sold at the same time, and the quasi easement only becomes an easement in fact by the severance of ownership: *Swansborough v. Coventry* (7), *Allen v. Taylor* (8).

On this ground, even if the defendant could otherwise have

(7) 9 Bing. 305; 2 L. J. C. P. 11.

(8) 16 Ch. D. 355; 50 L. J. Ch. 178.

(KAT, L.J.)

destroyed the spring or stream, I should be of opinion that the law would not permit him to do so. When the unity of ownership was severed, this watercourse and spring then existing in the condition I have described, it would be both apparent and continuous, and the defendant could no more interfere with it than the grantor could have done if he had retained the defendant's land.

I think an injunction should be granted in the terms suggested by Lord Justice LINDLEY, taken from *Watts v. Kelson* (3).

A. L. SMITH, L.J. : [after shortly stating the facts, continued:] It is not necessary to discuss the numerous authorities which the learned Judge touched upon in his judgment, for the two rules of law, one of which must be applied to this case, will be found clearly enunciated in *Broadbent v. Ramsbotham* (2) and in *Dudden v. Clutton Union* (1), and no doubt can be cast upon the accuracy of the law which is therein respectively laid down. In *Broadbent v. Ramsbotham* (2) it was held that where water, whether from a spring-head or any other source, is squandering itself over the surface of land before it has arrived at a natural defined course, the owner of the land over which it is so squandering itself may do what he likes with it, irrespective of what effect his action may have upon the volume of water in a stream down below, which has then become a defined natural watercourse. In *Dudden v. Clutton Union* (1) it was held that if a natural defined stream commences running from a spring-head the stream begins at the spring-head, which is its source, and that the owner of the land upon which the spring-head and the stream is situated must deal with them as one, and can only take such water from either as is incident to his right as being a riparian owner thereon. This being the law, it becomes necessary to ascertain what is the true result of the evidence given in this case, for until this be done it is impossible to say which of these two rules is to be applied. [The Lord Justice, after remarking that he had taken the opportunity since the case was argued to read through the notes, examined the evidence, and continued:] In the face of this testimony, it was argued on behalf of the defendant that the spinney did not contain a natural spring, and it was said that at some period prior to living memory (for the defendant

called no living witness to prove the fact) gravel had been dug out in and around the spinney, and that by this digging the water which was in the gravel was tapped, and that the present case was to be likened to water found at the bottom of a well when sunk, and consequently the plaintiff was not entitled to this water, even if it overflowed the surface of the well.

I do not decide whether the defendant would be correct in his law if he were right in his facts as to this, though I very much doubt it, for it seems to me that in such circumstances the hand of man would have brought about an artificial flow of water for a permanent and not a temporary purpose, and if so, that would suffice for the plaintiff (see *Wood v. Waud* (6)). But be this as it may, in my opinion the proved facts in no way support the suggestion made on behalf of the defendant. There is not a tittle of evidence that the water was not boiling up from the gravel before it was excavated in the same way as it most undoubtedly has been for years, and is boiling up now, though possibly not at the exact point where it now boils up. Mr. Justice KEKEWICH, as it seems to me, found that the water which came to the surface in the spinney was a natural spring, for he said it would not be right to attribute to it an artificial "origin." If, however, the defendant is correct in saying that Mr. Justice KEKEWICH did not find the water in the spinney to be a natural spring, I should have been of opinion that he was wrong; but, as before stated, I think he did hold that it was a natural spring.

I now come to the next point—viz. Did this water, rising as it did in the spinney, commence running in a natural defined stream from the spring-head, and so continue down to and through the plaintiff's lands? There is a body of evidence given on the part of the plaintiff to show that it did. [His Lordship referred to the evidence, and proceeded:] I cannot doubt upon the evidence in this case that Mr. Justice KEKEWICH arrived at a right conclusion when he held as follows: "It will be seen from the above summary of the facts that, in my opinion, the water flows naturally and in a defined channel from the drinking-place just below the spinney to that just short of the railway, and if the defendant was interfering with the water flowing down the grip to the prejudice of the plaintiff, he would, in my judgment, have a right of action against him."

(A. L. SMITH, L.J.)

In this I entirely agree. But Mr. Justice KEKEWICH also held that, because the defendant's diversion of the water took place in the spinney and in the land immediately below it, including the pond or drinking-place, before the water had reached the grip or even the short passage connecting that with the pond, the defendant was entitled to do so, and that the plaintiff's case consequently failed.

It is here, with all respect, I cannot agree with the learned Judge. It is proved that the spinney was the spring-head with ever-flowing water. One witness said that the spinney was combusted with springs. It is proved that the water ran direct from these springs to the old watering-place, and thence ran direct through a grip (whether a stone drain or not is immaterial) in a defined course down to the railway. In these circumstances, how can the diversion of the water in the spinney and land immediately below, as Mr. Justice KEKEWICH has found the diversion to be, be justified by the defendant?

There is no squandering here of the water over lands between the spring-head and where the water becomes a defined natural course: the diversion of the water, as Mr. Justice KEKEWICH has truly found, is in the spinney or immediately below it, *i.e.* in that which constitutes the source of the stream. Mr. Justice KEKEWICH applied the case of *Broadbent v. Ramsbotham* (2), and this is where the plaintiff says he has erred, and this is where I cannot agree with the learned Judge, for, in my judgment, the case of *Dudden v. Clutton Union* (1) is the case to be applied to the present.

I have so far dealt with the spring-head and the stream therefrom down to the railway. A point was taken by the defendant that there was evidence that the stream from the spring-head in the old stone drain, after it got below where the railway now is, used, before the railway was made, to debouch therefrom and then squandered itself over fields which are now the plaintiff's. There is some such evidence, but, whether reliable or not, I think it is immaterial, for, even if it be reliable, the plaintiff's predecessors were entitled to all water which would have come out of that stone drain before the railway was made, and this the defendant by his act, had the old stone drain still remained, has prevented from

flowing. In my judgment there is no evidence that the stone drain had been made for general purposes of draining.

For the reasons above stated, I think that the defendant is not entitled to dam back the water in the pond and to cart it away as he has done and is doing, and that the plaintiff is entitled to an injunction.

It was said by the defendant that the plaintiff was selling the water out of the stream where it passes him and that he is not entitled to do that. This is a question which a riparian owner below the plaintiff can complain of, and not a riparian owner above him, which the defendant is; he cannot complain of this, and the question does not arise.

I also think that the plaintiff's case could be supported upon the ground of an implied grant of an apparent and continuous easement, as the Lords Justices who have preceded me have stated; but, in my judgment, it is not necessary to resort to this in the present case, for, as above pointed out, the law applicable to riparian owners decides the case in favour of the plaintiff.

Appeal allowed.

Solicitors: *Bonner, Thompson, Burnie & Co.*, for *Calthrop & Bonner*, Spalding, for the Appellant.

Roscoe & Hincks, for *Deacon & Son*, Peterborough, for the Respondent.

IN RE HOLFORD, HOLFORD v. HOLFORD.

1894, May 1, 2, 28. LINDLEY, LOPES AND KAY, L.JJ.

Infants — Maintenance — Vested and Contingent Interests — Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 43.

Where under a will members of a class who are infants are entitled to shares in certain property contingently upon attaining twenty-one, those members of the class who by attaining that age have acquired a vested interest, take (as between them and the infant members of the class) a vested interest in only aliquot shares of the capital corresponding to the total number of members of the class; and are entitled only to shares of the income corresponding to their respective vested shares in the capital. Maintenance can therefore, under section 43 of the Conveyancing Act, 1881, be allowed to the infant members of the class out of the shares of income to which such infants respectively are contingently entitled.

In re Burton's Will, Banks v. Heaven (1), approved; *In re Jeffery, Burt v. Arnold* (2) (approved in *In re Adams, Adams v. Adams* (3)), overruled.

APPEAL from Chitty, J.

Henry Shaw Holford, by his will dated 30 April, 1888, devised and bequeathed the residue of his real and personal estate upon trust for sale and conversion, and directed his trustees, after payment of his funeral and testamentary expenses, to stand possessed of the proceeds of sale of his residuary estate upon trust, to pay and divide the same unto and among the child or all and every the children of the testator's brother, Thomas Holford, who should be living at the testator's decease, and should attain the age of twenty-one years, in equal shares if more than one; and if there should be only one such child, then the whole to be in trust for that one child. The will contained no express provision for the maintenance, education, or benefit of any infant beneficiary.

The testator died on 24 July, 1888. Six children of Thomas Holford were then living. The eldest child, Margaret Ann Dundas (formerly Margaret Ann Holford), attained twenty-one on 5 June, 1893. The other five children were still infants at the date of these proceedings.

(1) [1892] 2 Ch. 38; 61 L. J. Ch. 702; 67 L. T. 221.

(2) [1891] 1 Ch. 671; 60 L. J. Ch. 470; 64 L. T. 622; 39 W. R. 234.

(3) 3 R. 222; [1893] 1 Ch. 329; 62 L. J. Ch. 266; 63 L. T. 376; 41 W. R.

On 5 April, 1893, an action for the administration of the testator's estate was commenced by Charles Frederick Holford, one of the infants, by his next friend. The defendants to the writ (as afterwards amended) were the trustees of the testator's will, the said M. A. Dundas, the infant children other than the plaintiff, and the trustees of Mrs. Dundas's marriage settlement. By a summons in the action, dated 28 July, 1893, the plaintiff and the infant defendants asked for a declaration that the income of the share or presumptive share of each child of Thomas Holford living at the death of the testator and for the time being an infant, of and in the residuary estate of the testator, was applicable at the discretion of the trustees for the maintenance, education, or benefit of such child.

On 15 March, 1894, CHITTY, J., made the declaration asked for by the summons.

Mrs. Dundas appealed.

Byrne, Q.C., and *G. P. C. Lawrence*, for the appellant:

Section 43 of Conveyancing Act (4) does not apply, and there is no power to allow maintenance. When Mrs. Dundas attained twenty-one, she acquired an absolutely vested interest in one-sixth of the fund, and a vested interest in the remaining five-sixths liable to be divested if any other child of Thomas Holford should attain twenty-one; and until another child came of age she was entitled to the whole of the income. When a second child attained twenty-one, such child would take half of the income, and the appellant the other half. There is, therefore, no fund out of which maintenance can be allowed to the infants. *Shepherd v. Ingram* (5) covers this case, the only difference being that there the class might increase, while here it cannot.

(4) Conveyancing Act, 1881, section 43, subsection 1, is as follows:—

"Where any property is held by trustees in trust for an infant, either for life, or for any greater interest, and whether absolutely, or contingently on his attaining the age of 21 years, or on the occurrence of any event before his attaining that age, the trustees may, at their sole discretion,

pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education, or benefit, the income of that property or any part thereof, whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education, or not."

(5) 1 Amb. 448.

[LINDLEY, L.J. : I do not see why the income should not follow the capital. You could not have the capital paid over : why should you get the income?]

The doctrine of *Genery v. Fitzgerald* (6) and *Bective (Countess) v. Hodgson* (7), that income follows capital, applies only while the whole is in contingency, not after vesting in any one has taken place. *In re Jeffery* (2) and *In re Adams* (3) are in our favour. *In re Burton's Will* (1) was wrong.

[They also cited *In re Dickson*, *Hill v. Grant* (8), *Mills v. Norris* (9), *Scott v. Scarborough (Earl)* (10), *Mainwaring v. Bevor* (11), *Ellis v. Maxwell* (12), *Brandon v. Aston* (13), *Kidman v. Kidman* (14), *Rochford v. Hackman* (15), *Furneaux v. Rucker* (16), Lord Cranworth's Act (23 & 24 Vict. c. 145), s. 26.]

H. F. Wilson, for the trustees of Mrs. Dundas's marriage settlement, supported the appeal.

Farwell, Q.C., and *Davenport*, for the applicants:

From 1783, when *Hawkins v. Combe* (17) was decided, till 1891, no such claim as this was ever made. The general rule is that the principal attracts the interest.

[KAY, L.J., referred to *Nicholls v. Osborn* (18).]

Furneaux v. Rucker (16) simply goes to this, that a contingent specific gift does not carry interest. On attaining twenty-one a child simply takes his one-sixth share with accumulations, and,

(6) Jac. 468.

(7) 10 H. L. C. 656; 33 L. J. Ex. 601.

(8) 29 Ch. D. 331; 54 L. J. Ch. 510; 52 L. T. 707.

(9) 5 Ves. 335; 5 R. R. 56.

(10) 1 Beav. 154; 8 L. J. Ch. 65.

(11) 8 Hare, 44; 19 L. J. Ch. 396.

(12) 12 Beav. 104, 109; 10 L. J. Ch. 266.

(13) 2 Y. & C. C. C. 24.

(14) 40 L. J. Ch. 359.

(15) 9 Hare, 475; 21 L. J. Ch. 511.

(16) W. N., 1879, p. 135.

(17) 1 Bro. C. C. 334.

(18) 2 P. Wms. 419.

subject to the rights of the infants, an interest in their shares. In *Shepherd v. Ingram* (5) the gift vested at birth. *Mills v. Norris* (9), where the gift vested at twenty-one, only decided that a child was not entitled to share in "by-gone interest," i.e. interest which accrued before his birth. The other cases carry it no farther : *Scott v. Scarborough (Earl)* (10), *Mainwaring v. Bevor* (11), *Ellis v. Maxwell* (12). That exhausts the cases relied on for the appellant, except *Furneaux v. Rucker* (16).

[KAY, L.J. : There is no very good report of that case.]

Hawkins v. Combe (17) was not cited in *In re Jeffery* (2), and NORTH, J., had not present to his mind the principle of *Genery v. Fitzgerald* (6), that the income goes to those who are contingently entitled to the capital. *Brandon v. Aston* (13), *Rochford v. Hackman* (15) and *Kidman v. Kidman* (14), all show that the Courts thought the point clear.

Though in this case the settlor is not the father of the children, the appellant's argument would extend to the case of a father who, relying on the maintenance clause in the Conveyancing Act, inserted no express provision for maintenance in his will. A contingent legacy carries interest on the assumption that the parent intended to give maintenance. That is not reconcileable in principle with the contention here.

By the will each member of the class of children either takes an aliquot share carrying interest ; or takes, as a member of a class, an unascertained share. In either case the Act applies.

There is no case in which income has been taken away from a child in existence, and there is no suggestion that such a thing can be done in any book except Jarman on Wills (5th edit. p. 1026).

J. W. Cunliffe, for the trustees of the testator's will :

The trustees are willing to submit to any order.

Byrne, Q.C., in reply :

Hawkins v. Combe (17) is not really against us. There the interests were vested, subject only to be divested in a certain event. The distinction suggested between the two classes of cases is that in

the one class, but not in the other, the trustees can make payments without risk of overpayment. It has never been laid down that that makes any difference.

[He cited *In re Bunn*, *Isaacson v. Webster* (19), *Gibson v. Lord Mountfort* (20), and the note to *Shepherd v. Ingram* (5).]

Cur. adv. vult.

May 28.

LINDLEY, L.J.: This is an appeal from an order of Mr. Justice CHITTY declaring that the trustees of a residuary estate contingently given to six infants, one of whom has attained twenty-one, are entitled to apply five-sixths of the income of such estate to the maintenance of her five brothers and sisters who are still infants. [The Lord Justice read the will and stated the facts of the case, and continued:] The order appealed from appeared so manifestly right, that I confess that I was surprised to find it made the subject of an appeal.

It must be remembered that the income of a residuary personal estate, or of a residuary fund arising from the proceeds of the sale of real and personal estate, is regarded as accessory to the capital, and belongs to those to whom such residue is bequeathed. See *Genery v. Fitzgerald* (6), *Bective (Countess) v. Hodgson* (7). The income of such a residue belongs to the legatees thereof, absolutely or contingently according to the terms of the residuary gift.

The case which has to be dealt with may therefore be put thus: A testator bequeaths property, and the income of it, to such of the six children of A. as shall attain twenty-one, and it is contended that as soon as one of them attains twenty-one, he or she is entitled to the whole income until another of them attains twenty-one, and that then those two are entitled to the whole income until another attains twenty-one, and so on. This most extraordinary contention is not based on the intention of the testator, and is obviously opposed to that intention; but it is said that there is a series of decisions which compel the Court to defeat that intention, and to do a manifest injustice to the younger children. It is sought to make the injustice palatable to trained lawyers by wrapping it up in

(19) 16 Ch. D. 47; 29 W. R. 348.

(20) 1 Ves. Senr. 485; mentioned in a note, 5 Ves. 338.

technical language, and by bringing out the desired result as the logical conclusion from premises too well settled to be open to controversy. I confess that when I am sought to be driven to a conclusion which appears to me unreasonable and unjust, I at once suspect the validity of the premises, even if I can detect no flaw in the reasoning from them.

The argument for the appellant is based on the assertion that in the case of such a gift as I have mentioned, each child as he attains twenty-one acquires a vested interest in the whole fund, subject to be divested by other children attaining twenty-one, and that the first child who attains twenty-one is entitled to the whole income of the fund until some other child attains twenty-one and thereby acquires a similarly vested interest. But upon what principle a child who attains twenty-one acquires as between himself and his brothers and sisters a vested interest in more than one-sixth of the fund is to me quite unintelligible. The fund is given to all the children alike; as each attains twenty-one he becomes absolutely entitled to one-sixth; he and the other children are still contingently entitled to the remaining unvested shares; but no child who has attained twenty-one is entitled to a vested interest in more than one-sixth until his share is increased by the death of one or more of the other children under twenty-one. This is as true of the income as of the capital, and is in accordance with common sense and justice, and is moreover warranted by *Hawkins v. Combe* (17) and *Brandon v. Aston* (13), which last case is undistinguishable in any material respect from the present.

The principal authorities relied upon by the appellant are *Shepherd v. Ingram* (5), *Mills v. Norris* (9) and *Scott v. Scarborough (Earl)* (10). But when these cases are looked at it will be seen that not one of them decides the rights *inter se* of the existing members of a class of persons contingently entitled to property. *Shepherd v. Ingram* (5) was a decision on the rights of such a class of persons on the one hand, and other persons not included in that class on the other; it turned on the effect of a contingent gift to a class, and of a gift over in the event of no one of the class attaining an absolute interest. But in this case we have no concern with any one who is not a member of the class to whom the gift is made. That class cannot now wholly fail, for one child has attained

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twenty-one, and if all the other members of the class die under twenty-one, the child who has attained twenty-one will take the whole fund absolutely. There is good sense in saying that the income of property given contingently to a class of persons belongs to its members for the time being as against persons who are only entitled if and when the class ceases to exist; but there is no sense in saying that one of a class takes the whole income in which other persons belonging to the same class have already a contingent interest which may become absolute. In *Mills v. Norris* (9) and *Scott v. Scarborough (Earl)* (10), the question for decision was whether some members of a class were entitled to the income of property given to them and others of the same class who were not yet born; and the answer was yes. The decision was obviously reasonable and just: to treat the future possible rights of unborn persons as existing rights, even if only contingent, would have been to depart from sound principles for no sufficient justification.

The other older cases cited by the appellant are open to similar observations, or present still less difficulty. *In re Jeffery* (2), decided by Mr. Justice NORTH, proceeded in my opinion upon a misconception of the cases to which I have alluded, and cannot be supported. *Furneaux v. Rucker* (16), referred to by Mr. Justice NORTH, in *In re Jeffery* (2), and again more fully in *In re Adams* (8), presents some difficulty, but it was not a case of a residue, and I do not know enough about it to adopt it as an authority for departing from the principle on which *Hawkins v. Combe* (17) and *Brandon v. Aston* (18) were decided.

I come, therefore, to the conclusion that the infant children are contingently entitled to five-sixths of the residue with which we have to deal, and that neither the whole capital nor the whole income of such residue is during their minority vested in or payable to the child who has attained twenty-one.

If this be so, it is plain that the statute 44 & 45 Vict. c. 41, s. 43, authorizes the trustees to apply the infants' contingent shares of income towards their maintenance. [The Lord Justice read the section, and continued:] It is true that if all members of the class had died under twenty-one there would have been an intestacy, and the next of kin would have taken the residue, but notwithstanding

that possibility, the Act authorized the application of the income towards the maintenance of the members of the class whilst all were under age. This was decided, and quite rightly, in *In re Adams* (3). So, although if those children who are still under age should die under twenty-one, the child who has attained twenty-one will take their shares, still the act authorizes the application for their maintenance of the income of their contingent shares, for that income contingently belongs to them. This conclusion is perfectly consistent with the decision of this Court in *In re Dickson, Hill v. Grant* (8), for the interest on the legacy there in question did not follow the legacy before it became vested, but was payable to persons other than the legatee. The Court held that the Act 44 & 45 Vict. c. 41, s. 43, did not authorize the maintenance of an infant out of income which did not and never could belong to him; but the Act was clearly intended to authorize and does authorize his maintenance out of income which will become his if he lives long enough to acquire a vested interest in the property from which the income arises.

The decision appealed from is quite correct, and the appeal must be dismissed with costs.

If the contention of the appellant were sound, it would follow that although whilst all the children were under age all might have been maintained out of the income out of this residue, yet that as soon as one of them attained twenty-one he became entitled to the whole income, and none of it could be applied to the maintenance of his brothers and sisters. They would be left to the charity of their relations, or to the poorhouse. I cannot construe the will or the Act so as to bring about so monstrous a result.

LOPES, L.J., concurred.

KAY, L.J.: A difference of opinion has arisen concerning the construction and effect of a gift by will of residue to such of the children of A. living at the testator's death as shall attain twenty-one.

At the testator's death the maximum number to take are ascertained, and the question is whether the first who attains twenty-one takes all the income subject to admitting others to share as they respectively attain that age, or whether he should only have a share

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of such income according to the number of individuals living who, if they attain twenty-one, will acquire vested interests.

None of the older authorities is exactly in point. But there are cases where the gift was in effect to all the children who may be born to A. in his lifetime. Where A. at the testator's death has only one child, there is authority for giving all the income to that child until another is born. The difference is obvious. There is no possibility of saying what is the least share to which the existing child is entitled, and therefore the alternative is to give him all or nothing.

The words of the will in this case, which we have to construe, are a gift of the residue of the proceeds of the testator's real and personal estate after payment of debts and legacies "Upon trust to pay and divide the same unto and among the child or all and every the children of the said Thomas Holford who shall be living at the time of my decease, and who shall attain the age of twenty-one years in equal shares if more than one, and if there shall be only one such child the whole to be in trust for that one child." Thomas Holford was a brother of the testator. At the testator's death he had six children, all infants. One of these children has now attained twenty-one. The others are still infants. There is no provision for maintenance in the will. It is obvious that section 26 of 23 & 24 Vict. c. 145, and section 43 of the Conveyancing Act, 1881, which enlarge the power of giving maintenance in certain cases, cannot affect the construction of the will. The words must be first construed, and then it must be seen whether the case is one in which the Statute enables maintenance to be given. The testator was not *in loco parentis* to these legatees. Whichever construction be adopted there would be no power to give maintenance to the infant children independently of the statute. Therefore any argument as to the hardship of adopting one or other construction on the ground that the statutes would not apply is entirely out of the question, and very likely to lead to error. To adopt one construction because in that case the statute would enable maintenance to be provided for the infant children, would be wrong in point of logic and principle. This is a case in which the testator has not provided maintenance out of the income of a contingent share, and if he has

given that income to someone other than the infants, the statute does not enable the Court to take away the income so given in order to maintain the infants: *In re Dickson, Hill v. Grant* (8).

The question is whether upon the true construction of the will, independently of the statutes, the testator has given away the intermediate income or not. In *Shepherd v. Ingram* (5) (1764), there was a gift of the residue of real and personal estate to such child or children as the testator's daughter F. should have, as tenants in common. If she left no child there was a gift over. F. married after the testator's death and had three children, all infants. It was held that the children took interests which were defeasible, and that the firstborn took all the income, and must share with others as they came into existence. It is clear that the children's interests were not contingent, but vested subject to be divested if all died in their mother's lifetime.

This decision was followed in *Mills v. Norris* (9), *Scott v. Scarborough (Earl)* (10).

In *Hawkins v. Combe* (17) the testator gave his real and personal estate to trustees, as to one-third to invest, and during the joint lives of his niece and her husband or until one of her children should attain twenty-one to accumulate the income, and if she survived her husband and had issue under twenty-one then to pay the interest to her for their maintenance, and on their respectively attaining twenty-one to pay and transfer the capital and all arrears to such children equally. There were two children, one of whom had attained twenty-one. The father and mother were living, and Lord Commissioner ASHURST held that when the eldest came of age the accumulation ceased, and the income thenceforward belonged to the two children in equal shares, although the infant's interest in the capital was contingent.

In *Brandon v. Aston* (13) the gift was to such of the children of J. N. as should attain twenty-one, or being daughters marry, in equal shares. There were three children, two of whom had attained twenty-one when their interest came into possession. The VICE-CHANCELLOR allowed to those two the interest of their shares only. The remaining one-third was carried to the contingent account of the infant, and the order was expressed to be without prejudice to the claim of any future-born children. This case shows what I

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apprehend is the true distinction between the two classes of cases which I indicated in the commencement of my judgment. The VICE-CHANCELLOR did not think he could withhold their actual shares of the income from the children who were in existence, because of the possibility that others might be born who might become entitled to share. On the other hand, he did not think it right to give the whole income to the children who had attained twenty-one, and whose shares had vested, so as to deprive an infant who was in existence of his contingent share if he attained twenty-one. This case was cited and seems to have been followed in *Rockford v. Hackman* (15).

In *In re Jeffery* (2) Mr. Justice NORTH seems to treat this case as though it were inconsistent with the previous decisions to which I have referred, but with deference for the reasons I have given I do not think it at all at variance. It seems to me to follow those decisions as to various members of the class, but to make a distinction as to individuals in existence who, if they attain twenty-one, will become entitled to share.

In *In re Burton* (1) Mr. Justice CHITTY differs from the conclusion of Mr. Justice NORTH, but though *Brandon v. Aston* (13) was cited he does not refer to it in his judgment.

The question came again before Mr. Justice NORTH in *In re Adams* (3), in which, after considering the case of *In re Burton* (1), he adhered to his former decision, relying upon a case of *Furneaux v. Rucker* (16), in which it appears that the late Master of the Rolls, Sir G. JESSEL, gave all the income of leaseholds specifically bequeathed to a child who had attained twenty-one, to the exclusion of other existing children who were infants who might become entitled if they attained twenty-one.

The balance of authority as well as reason seems to me to be in favour of holding that the child who first attains twenty-one under such a gift should receive only an aliquot share of the income in proportion to the number of existing children, subject to be increased if any child should die under twenty-one. The income of the contingent shares independently of the statute would be accumulated for the benefit of those who may become ultimately entitled to it.

To the income of such a contingent share the statute applies. It is obvious that only those who attain twenty-one will become entitled to such income. But the statute nevertheless enables the application of the contingent share of such income for the maintenance of an infant who may never become entitled to any of it, and thus takes away that income from the others who attained twenty-one; indeed, it goes further, and directs the accumulation and capitalization of any of such contingent income not required for the maintenance of the infants. This is very arbitrary legislation. But it was attempted to carry the operation of the statute further, and to make out that it had the same effect even where the intermediate income until the legatee attained twenty-one was given by the will to another person. The peculiar wording of the Conveyancing Act, 1881, s. 43, differing from Lord Cranworth's Act (23 & 24 Vict. c. 145), s. 26, afforded considerable ground for this argument; but a construction so shocking to reason and justice was rejected by the Court, and it may now be considered settled that when either expressly or by the true construction of the will the intermediate income is disposed of, such income cannot be taken away from the person entitled to it in order to maintain an infant only contingently entitled to the capital from which it is derived: *In re Judkin's Trusts* (21), *In re Dickson, Hill v. Grant* (8).

Appeal dismissed.

Solicitors: *Sutton, Ommanney & Rendall*, for the Appellant.
Cunliffes & Davenport, for the Respondents.

(21) 25 Ch. D. 743; 53 L. J. Ch. 496; 50 L. T. 200; 32 W. R. 407.

WALLACE v. UNIVERSAL AUTOMATIC MACHINES CO.

1894, May 5, 28. LINDLEY, LOPES, AND KAY, L.JJ.

Company—Debenture—Time of Payment—Acceleration—Winding-up.

By the compulsory winding-up of a company under the Companies Acts before the date fixed for payment of its debentures, the time of payment is accelerated and the debenture-holders are entitled to realise their security for the full amount.

In re Panama, New Zealand and Australian Mail Co. (1) and *Hodson v. Tea Co.* (2) followed.

APPEAL from Kekewich, J.

The above-named company was formed and registered under the Companies Acts in September, 1887. Its object was to acquire and work certain patents. It had power to borrow money on debentures, and it raised 6,000*l.* at 6 per cent. on sixty debentures for 100*l.* each, secured on the undertaking and property of the company both present and future as a "floating security" and so as "not to prevent or hinder the company from leasing, exchanging, selling, mortgaging, or otherwise dealing with the property as it might from time to time think fit." The interest was payable half-yearly, on 1 July and 1 December. The principal was not payable till 31 December, 1894, but power was given to the company to pay off the debenture-holders on 1 July or 1 December in any year on three calendar months' notice. The debentures were issued without any condition that the principal moneys should become payable if default were made in payment of interest or a winding-up ordered or resolved upon.

Default in payment of the interest on 1 July, 1890, having been made, the plaintiff issued a writ on behalf of himself and all other the holders of debentures of the company for the usual accounts to be taken, and for realisation of their security by foreclosure or sale and for a receiver, and on 4 July, 1890, a receiver was appointed.

(1) L. R. 5 Ch. 318; 39 L. J. Ch. 162, 482; 22 L. T. 424; 18 W. R. 441.

(2) 14 Ch. D. 859; 49 L. J. Ch. 234; 28 W. R. 458.

On 19 July, 1890, an order for winding up the company by the Court was made. On 5 February, 1894, a statement of claim was filed, and on 14 March the action was heard as a short cause on motion for judgment in default of defence, when Mr. Justice KEKEWICH, being of opinion that the debenture-holders were entitled to a judgment which would protect them, but not to anything in the nature of a covenant for immediate payment of the money, made an order declaring that the plaintiff and all other the holders of the debentures mentioned in the statement of claim were entitled to a charge on all the undertaking and property of the company for securing the principal money and interest intended to be secured by the debentures, and directed an inquiry what debentures had been issued, and which of them were still outstanding, and what persons were the holders of the same respectively, and an account of what was due for interest to the plaintiff and other holders of the outstanding debentures, and an inquiry of what the property consisted, and in whom it was vested.

The plaintiff appealed.

Etc., for the appellant :

The debenture-holders are entitled to realise their security; *Hodson v. Tea Co.* (2), *In re Panama, New Zealand & Australian Royal Mail Co.* (1). *Brownlie v. Russell* (3), which was a case under the Building Societies Acts, also supports my contention.

[LINDLEY, L.J. : The authorities show that a creditor is entitled to realise his security as soon as the company is wound up; but the question is how much he is entitled to for his security.]

[The COURT referred to *In re Browne* (4).]

Cur. adv. vult.

May 28.

LINDLEY, L.J. : The question is whether, for the purpose of realizing the debenture-holders' security, the principal moneys secured by the debentures and thereby made payable at a future date can be treated as if they had become due at the date of the commencement of the winding-up.

(3) 8 App. Cas. 235; 48 L. T. 881.

(4) [1891] 2 Q. B. 574; 61 L. J. Q. B. 15; 65 L. T. 485; 40 W. R. 71.

(LINDLEY, L.J.)

The facts are simple. [His Lordship stated the facts and proceeded:] The plaintiff is not content with the order of Mr. Justice KEKEWICH as no account is directed of what is due in respect of the principal sums secured, and he has appealed in order to have the judgment corrected in this respect. The time for the payment of the principal not having yet arrived, it is clear that it is not a debt for which any action at law could now be brought. But it is equally clear that, as the company is being wound up, the plaintiff and the other debenture-holders could, if they chose, prove against the company in respect of all the moneys secured by the debentures whether due or not (see the Companies Act, 1862, s. 158) (5). Moreover, by the Judicature Act, 1875, s. 10, if the debenture-holders did so prove they would have to give up their securities, and they could only prove for such amount as would be provable if the company had been a debtor, and had been adjudicated bankrupt. The amount provable in bankruptcy in respect of a future debt bearing interest was determined in *In re Broune* (4). The plaintiff, however, is not seeking to prove his debt, nor is he bound to do so. On the other hand, he is not content simply to rest on his security, nor is he content to have his interest kept down. He wants to realise his security and to apply its proceeds in paying off the principal and interest, although the time fixed for paying off the principal has not yet arrived. The undertaking on the security of which the money was borrowed has in fact come to end by the winding-up, and this circumstance entitles the debenture-holders to realise their security. This point was determined in *Hodson v. Tea Co.* (2), which was itself based on the earlier case of *In re Panama, New Zealand & Australian Mail Co.* (1). In *Hodson v. Tea Co.* (2), the debenture was not due, but it was treated as having become due

(5) Section 158 of the Companies Act, 1862, provides:—

“In the event of any company being wound up under this Act, all debts payable on a contingency and all claims against the company, present or future, certain or contingent, ascertained or sounding only in dam-

ages, shall be admissible to proof against the company, a just estimate being made, so far as is possible, of the value of all such debts or claims as may be subject to any contingency or sound only in damages, or for some other reason do not bear a certain value.”

on the commencement of the winding-up of the company, and accounts were directed of what was due for principal and interest on that footing. The principle on which this decision is founded is in my opinion correct, and the plaintiff is in my opinion entitled to an order to give effect to it. The order appealed from must be varied accordingly, and the costs must be added to the amount due to the plaintiff on his security. Lord Justice KAY has framed a declaration which should, I think, be embodied in the order so that its principle may be made clear.

LOPES, L.J. : I concur in the judgment of Lord Justice LINDLEY.

KAY, L.J. : [after shortly stating the facts, continued :] The question is whether the debenture-holders can claim as against the security the principal and the full amount of the principal, although the day fixed for payment has not arrived, or whether they must be satisfied with interest only till the day of payment, or with the principal subject to discount for payment before the day on which the principal becomes due.

It is material to observe that it is not a question of proof in the winding-up, but of realisation of the security. By the winding-up order the position of the debenture-holders is very much altered. The subject of their security is amongst other things the undertaking, that is the profit-producing concern. The winding-up practically puts an end to any chance of producing further profits. The security is a floating charge, that is the company might use all its assets included in the security for the purposes of its *bonâ fide* business as though the charge did not exist. These powers are to some extent vested in the liquidator for the purposes of winding up the company. If the debenture-holders were compelled to wait until the debentures became due, the security might and probably would be very much depreciated in the meantime. These considerations lead to the conclusion expressed by Lord Justice GIFFARD in the case of *In re Panama, New Zealand & Australian Mail Co.* (1), that upon the occurrence of the winding-up the debenture-holders had a right at once to realise their security. It follows that if the time for realising is accelerated by this event, the realisation must be for the full amount as though the debt was then due, and this seems to have been held in the same case. The same result was arrived at

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by Vice-Chancellor HALL in *Hodson v. Tea Co.* (2). I think there should be a declaration that upon the occurrence of the winding-up the debenture-holders became entitled to realise their security for the full amount secured by their respective debentures, notwithstanding that the day mentioned therein for payment of the capital had not arrived, and that an account should be directed of what is due for principal and interest to the time of actual payment on this footing, and for the costs of this action. The costs of this appeal should be added to the security.

Order varied.

Solicitors: *Slaughter & May.*

BUDGETT v. BUDGETT.

1894, June 6. LINDLEY AND DAVEY, L.JJ.

Appeal—Time for—Order made before 1 Jan. 1894—R. S. C., 1883, Order LVIII. r. 15—R. S. C., Nov. 1893, r. 27 (Order LVIII. r. 15).

The time for appealing against a judgment or order dated before 1 Jan. 1894, when the rules of November, 1893, came into operation, is still regulated by the R. S. C., 1883.

APPLICATION for leave to appeal from Romer, J.

On 24 July, 1893, ROMER, J., gave judgment for the plaintiffs in an action in which the applicant was one of the defendants, and also plaintiff by counterclaim. The judgment was perfected on 24 August, 1893. On 1 January, 1894, the R. S. C. of November, 1893, came into operation. Rule 27 of such Rules substitutes the period of three months as the time within which a notice of appeal against a judgment or final order must be given for the period of twelve months allowed by Order LVIII. r. 15, of the R. S. C., 1883. The applicant now applied for leave to appeal, if such leave was necessary.

Meakin, the applicant, in person, for the application.

Ingle Joyce, for the plaintiffs in the action :

The new Rule applies, and the appeal is out of time.

[DAVEY, L.J. : How can the new Rule take away the vested right to appeal ?]

Even since the new Rule came into force the applicant has had more than three months.

Percy W. Bunting, and *A. W. Chaster*, for other respondents.

LINDLEY, L.J. : I do not think this question has been decided either in this Court or in the other branch of the Court of Appeal. I have consulted Lord Justice DAVEY, who has been sitting in the other Court, and he does not know of any decision on the point.

We both agree that the new Rule does not apply to this judgment, and that no leave to appeal is necessary. The defendant may enter his appeal without leave at any time before 24 August, 1894.

Solicitors : *Ingle, Cooper & Holmes*, for the Respondents.

IN RE MACDONALD, SONS AND CO. (LIMITED).

1898, November 7. LINDLEY, A. L. SMITH AND DAVEY, L.JJ.

Company—Winding-up—Contributories—Founders' Shares—Agreement to take as fully paid up—Acceptance—Retention of Certificates—No Contract registered and no entry of Names in Register of Company—Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 23, 74—Companies Act, 1867 (30 & 31 Vict. c. 131), s. 25.

Founders' shares in a company were offered to certain persons as fully paid on their consenting to push the sale of certain goods the company proposed to sell. No contract in respect of the issue of these shares was registered under section 25 of the Companies Act, 1867. The certificates which did not state that the shares were fully paid were forwarded to and their receipt was duly acknowledged by the recipients, but a letter was sent about the same time by the company stating that the shares were fully paid. The certificates were retained by the recipients until the company requested that they should be returned on the ground of a mistake in allotment; this request was complied with. None of the recipients were entered on the register of shareholders. On the company being afterwards wound up:—

Held, that the names of the recipients must be removed from the list of contributories on the ground that they had only agreed to take fully paid up shares, and that no contract to take other than fully paid up shares could arise from the retention of the certificates.

APPEAL from a decision of Vaughan Williams, J., given on 7 August, 1898.

The above named company was formed in 1892 for the purpose of acquiring and carrying on the business of two persons who carried on the business of medicated wine manufacturers. The company agreed to purchase the business for 6,000*l.*, to be paid as to 1,000*l.* in cash, and as to 5,000*l.* in fully paid-up ordinary 1*l.* shares. In addition there were to be paid to the vendors forty "founders' shares" of 25*l.* each to be allotted as fully paid up to the persons named by the vendors as founders of the company.

The company, with the consent if not by the direction of the vendors, entered into negotiations with various medical men to induce them to prescribe and recommend to their patients and tradesmen the goods dealt in by the company, promising to each medical man who undertook to do so a founders' share. These negotiations were in some cases conducted directly between the

doctors and the secretary of the company without any mention of the vendors. The only agreement that was ever attempted to be registered under section 25 of the Companies Act, 1867, was the agreement between the company and the vendors.

On 28 July, 1892, the directors went to allotment, and in addition to allotting the ordinary shares taken by the public, two of the directors signed and sealed the forty founders' shares in blank. On 5 July, 1892, the company's then solicitor wrote to the directors to remind them of the necessity of registering the contract under which the fully paid-up shares were to be allotted to the vendors or their nominees in order to prevent any liability attaching to such shares. The directors instructed the solicitor to take the proper steps for the registration of the contract, but there was some delay in the matter, and on 10 September, 1892, the solicitor wrote to the directors for a cheque for the amount of the stamp. The cheque was sent, but was not paid at Somerset House, and the contract was never in fact registered. The secretary had in the meanwhile filled in the names of the doctors who were willing to accept founders' shares on the terms above mentioned, including nine medical men, Messrs. Phillips, Worley, Sworn, W. B. Richards, A. F. Richards, Carter, Hoare, Cundell and Farr, and sent them certificates for such shares, having at the same time or previously written to them to the effect that the shares were fully paid up, and that the recipients would incur no liability by accepting them.

The certificates did not on the face of them contain any statement that the shares were issued as fully paid up, and the recipients acknowledged their receipt by letter without any qualification or condition, but were not entered in any register of the company as shareholders, the register of shareholders containing only the names of the ordinary shareholders.

On 18 October, 1892, the directors resolved to call a meeting to consider the advisability of winding up the company, and on the same day the secretary wrote to each of the recipients of the founders' shares as follows: "The founders' share certificate having been irregularly posted to you, not having been allotted, kindly return same to us, for your own interest, by return of post." The real reason for demanding the return of the share certificates was that the company had at this time a new solicitor who had

discovered that the certificates had been issued without any contract having been registered, and the company desired, if it were possible, to relieve the recipients from liability.

On 28 October, 1892, a resolution to wind up voluntarily was passed, and on 9 November the company was ordered to be wound up compulsorily. The liquidator thereupon settled the recipients of the founders' shares on the list of contributories of the company. On the application of the nine medical men in question the learned Judge ordered their names to be struck off the list of contributories on the ground that they had only agreed to take fully paid-up shares, and that no contract to take other than fully paid-up shares could arise from the retention by them of the certificates. His Lordship refused to give the applicants any costs as against the liquidator, and remarked that it was a sad thing that members of a learned profession should have condescended to accept shares on the terms on which they had accepted them, and that although it might be that an individual doctor thought well of the wares of the company, and that in prescribing or recommending such wares he acted according to his conscience, it was not the less the fact that the shares were taken as bribes.

The liquidator appealed.

Cozens-Hardy, Q.C., and *J. Bacon* (with them *Israel Davis*), for the appellant, contended that the acceptance and retention of the share certificates by the respondents constituted an agreement between them and the company to take the particular shares, and that they were consequently rightly put on the list of contributories: *In re Empire Assurance Corporation, Challis' case* and *Somerville's case* (1). They submitted that the fact that the founders were not entered on the register was, under the circumstances, immaterial: *Portal v. Emmens* (2); and that the counterfoils of the certificate book amounted to a register: *Weikersheim's case* (3).

Warrington, for the respondents, relied on *Arnot's Case* (4),

(1) L. R. 6 Ch. 266; 40 L. J. Ch. 431; 23 L. T. 882; 19 W. R. 453.

(2) 1 C. P. D. 664; 46 L. J. C. P. 179; 35 L. T. 882; 25 W. R. 235.

(3) L. R. 8 Ch. 831; 42 L. J. Ch. 435; 28 L. T. 653; 21 W. R. 612.

(4) 36 Ch. D. 702; 57 L. J. Ch. 195; 57 L. T. 353.

and submitted that the agreement, if one was to be implied, was to take fully paid-up shares.

LINDLEY, L.J.: This is an appeal on the part of the liquidator against an order of Mr. Justice VAUGHAN WILLIAMS deciding that certain gentlemen, to whom I shall have occasion to allude, are not contributories in the winding up of the company. I do not myself propose to say anything about the facts disclosed as to the morality or immorality of what has taken place. That is a matter for the medical council to consider. But however much we may disapprove of the course of the transactions disclosed, we cannot allow ourselves to invent a contract where there is none; to treat as facts or draw inferences which reasonable men would not find as facts or draw as inferences. The question is whether these gentlemen ought to be put on the list of contributories. That depends on the meaning of the word "contributory" in the Companies Act, 1862. Section 74 of that Act, defines "contributory" as meaning "every person liable to contribute to the assets of a company under this Act in the event of the same being wound up; it shall also, in all proceedings for determining the persons who are to be deemed contributories, and in all proceedings prior to the final determination of such persons, include any person alleged to be a contributory." To get to that meaning it is necessary to refer back to section 23 which defines who is a member—a section the words of which we are all so familiar with that I will not read them. It includes persons who have agreed to become members, and whose names are on the register of members. The Court has power to rectify the register and to place on the register the names of persons that ought to be there. These gentlemen are clearly and plainly not members under the definition in the Act. They must for that purpose be registered as shareholders. They are not registered. But there is such a thing as being a member by estoppel. I proceed to ask if they are members by estoppel. It is not established that they are so by anything done by themselves. If they are members by estoppel it must be that they have acted so as to represent themselves to be members and so as to induce people to act on the faith that they were members. There is no evidence that such was the case. None of the various applicants have been placed on the list of

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members. They cannot be liable on that ground. They retained the certificates, so long as they had them, only on the footing that they were to have shares in respect of which they had no liability, and the certificates were returned when they were asked for. That was done on the ground that there was a common mistake. They are not members within the definition in the Act; they are not members by estoppel; they are not contributories because they have not agreed to become members, or at all events there is no agreement enforceable against them, because there was a common mistake. The appeal should, in my opinion, be dismissed.

A. L. SMITH, L.J.: I concur.

DAVEY, L.J.: This is an application to put on the list of contributories a number of gentlemen not on the register of shareholders of the company. The application can only succeed, therefore, if the liquidator can make out that there were enforceable contracts by them to take these shares; he must show that there are circumstances which would entitle the liquidator to call on the Court to rectify the register. These gentlemen were not applicants for shares; they fall into two classes, most of them had offers of the shares from the vendors to the company; two or three were invited to take these shares after the formation of the company. [His Lordship read the terms of the offer and acceptance of a fully paid-up founders' share free from all liability in one of each class of cases, and continued:] Consequently the contract, if there were any, was to take a share to which there was no liability attached. Counsel for the appellants have argued that these gentlemen had gone beyond the stage of contract to take a share, and had each accepted a definite share appropriated to him. It appears to me that it may be considered, for the purpose of argument, that the acceptance of the share was so far an appropriation as to create an implied contract to take that particular share, but only to take it assuming it to be paid up; and assuming that what took place was an authority to put the several doctors on the register of members, such authority was subject to the shares being properly treated as fully paid. If the secretary had placed them on the register it might have been

difficult for them to escape. The transactions were never completed. It was, in my opinion, competent for the respondents respectively to revoke such authority as was implied. It was given on the condition that the shares were fully paid up, and if the company, or the voluntary liquidator before the compulsory order, had attempted to enforce the contracts and place these gentlemen's names on the register of members, neither the company nor the liquidator would have succeeded on the ground that the respondents had given no such authority or made any such contract as is alleged. It is not necessary to rely on what followed, but, in my opinion, the requests to have the certificates returned, followed by their return, put an end to whatever contracts ought to be implied from the preceding circumstances. I think, therefore, the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Halses, Trustram & Co.*, for the Appellant.

Oldfield, Bartram & Oldfield, for the Respondents.

IN RE DUKE OF CLEVELAND'S ESTATE,
WOLMER v. FORESTER.

1893, Nov. 21, 22, 30. LINDLEY, A. L. SMITH, AND DAVEY, L.JJ.

Will—Construction—Estates in Settlement—Arrears of Rent at Testator's Death—Outgoings Payable thereout.

A testator by his will settled certain estates and bequeathed to each person who at his death should become entitled to the possession or the receipt of the rents and profits of any of such estates all arrears of rents and profits which at the testator's death might be due to his estate, and also all proportions of the same accruing due before but payable after his death, but so nevertheless that all outgoings properly chargeable against such arrears and proportions, and not discharged in his lifetime, should be paid out of such arrears and proportions. The Court of Appeal held that such outgoings were not confined to rates, taxes, tithes, tithe rent-charge and other outgoings (if any) recoverable by process of law as against or in respect of the hereditaments out of which the rents were derived, but included agents' salaries, the costs of repairs and improvements and other wages of workmen employed on the estates, and in fact all expenses which in the ordinary course of management would require to be made in order to maintain the estates in a fit state to earn rent or which would be proper deductions before ascertaining the net rents receivable as income.

APPEAL by Captain Arthur W. H. Hay from a decision of Kekewich, J.

The late Duke of Cleveland, by his will dated 22 July, 1891, after appointing Viscount Wolmer and F. G. Hilton Price executors and trustees, devised certain estates in Somersetshire and the Battle Abbey estates to the use of his great-nephew, Captain Francis William Forester, during his life, with remainder to the use of his first and other sons successively according to seniority in tail male, with remainder to the uses thereafter declared; and the testator bequeathed to each person who at his death or as from his death should become entitled to the possession or to the receipt of the rents and profits of any hereditaments thereinbefore devised all arrears which at the testator's death might be due to his estate, of rent and profits arising from the same hereditaments and also all proportions to become due to his estate after his death of rents and profits accruing due at but payable after his death, but so nevertheless that all outgoings of the said hereditaments properly chargeable against such arrears and proportions and not discharged in his lifetime shall be paid out of such arrears and proportions.

The testator died on 21 August, 1891, and his will was duly proved by both executors on 24 November, 1891. The executors and trustees took out an originating summons to which Captain Forester was the defendant, for the determination by the Court of the following questions: *i.e.* what, according to the true construction of the will, were the "outgoings" of the estates devised by the said will to the defendant, F. W. Forester, during his life properly chargeable against the arrears and proportions of rent by the will bequeathed to the defendant, and which outgoings were not discharged in the lifetime of the duke, and in particular with reference to (i.) rates, taxes, tithes, and agent's salary; (ii.) repairs commenced and completed before the duke's death; (iii.) repairs commenced before but not completed at the duke's death, and for the execution of which an agreement had been entered into with a new tenant, and a date for completion either had or had not been fixed; (iv.) repairs commenced before the duke's death and not completed at his death, and for which there had been no contract with any tenant; (v.) ordinary repairs from time to time carried on upon the said hereditaments; (vi.) repairs for which a contract with a builder had been entered into by the duke; (vii.) wages of workmen employed on the said estates. The learned Judge, on 10 August, 1892, decided that, according to the true construction of the will, the outgoings of the estate thereby devised to Captain Forester during his life properly chargeable against the arrears and proportions of rents by the will bequeathed to him included only rates, taxes, tithes, tithe rent-charge, and other outgoings (if any) which were recoverable by process of law as against or in respect of the hereditaments out of which such rents had been derived, and that in particular such outgoings did not include agent's salary or the cost of any repairs or improvements or wages of workmen employed on the estates, notwithstanding that it might have been the practice of the testator to debit the same to the particular parts of the estates in respect of which such expenditure was incurred.

Captain Hay, the residuary legatee under the will, and who, by order dated 26 June, 1893, had been added as a party defendant with liberty to attend upon the settling and passing of the order pronounced on 10 August, 1892, appealed.

The appeal came on for hearing on 4 November, 1893, but was

ordered to stand over so that Lord Barnard, who had established his title to the barony of Barnard, and consequently under the duke's will was entitled to the Raby Castle estates for his life, might be served with notice of the appeal. The case again came on for hearing on 21 November, 1898.

Cozens-Hardy, Q.C., and *C. Ashworth James*, for the appellant, contended that the "outgoings" included not only the items in the summons which by the learned Judge's order were declared to be included, but also the agents' salaries and the costs of the various repairs mentioned in the summons.

Warmington, Q.C., and *W. Druce*, for Captain Forester, the tenant for life.

Buckley, Q.C., and *Ingle Joyce*, for Lord Barnard.

E. Beaumont, for the executors and trustees of the will.

Cur. adr. vult.

November 30.

LINDLEY, L.J.: In this case my brothers will read their judgments, which I have carefully considered and in which I acquiesce. Lord Justice DAVEY has reduced into writing the form of the order, which we have all gone through with great care.

A. L. SMITH, L.J.: The question in this case arises upon a clause in the will of the late Duke of Cleveland, who died on 21 August, 1891, having made his will shortly before that date. At the time of his death the duke was possessed of large landed estates which may be called the Somersetshire estates, the Raby Castle estates, and the Ashton Keynes estates. These different properties had their respective agents, who received the rents accruing therefrom and retained in hand that which each considered sufficient to pay rates, taxes, tithes, his commission or salary, as the case might be, and what he thought would be required for repairs and wages, the details of which are set forth with particularity in a statement of facts agreed upon between the parties. From time to time these agents remitted to the duke what money they considered it unnecessary to retain, without any accounts, but they annually

sent him an account with a cheque to balance it. In this way these estates had for years been managed, and were being managed at the time when the duke made his will.

The question immediately before the Court relates solely to the Somersetshire estates, to which Captain Forester became entitled under the will of the duke, though Lord Barnard, who has proved his title to the Raby Castle estates, was represented by counsel before us, for the construction of the clause in question affects him as well as the other tenants for life of the other estates. It will be seen that the clause in question first deals with what the duke was about to give to the tenants for life who were coming into their respective estates. It then deals with the obligations he imposes upon them in consideration of the gifts he was about to make. The clause when applied to the facts reads: "I bequeath to Captain Forester, who becomes entitled to my Somersetshire estates, all arrears of rents and profits arising from such estates, which may be due at my death, and also all proportions of such rents and profits accruing due at the date of my death, though not payable till after." Now, stopping here, it is manifest that the duke was desirous of bestowing upon the tenants for life who were coming into their respective estates something which, unless specifically bequeathed to them, they would not have taken. Having made this bequest in their favour he then proceeds to place an obligation upon them—viz. that they should discharge out of what they would receive certain outgoings, and what these are is the question in this case. The clause proceeds: "But so, nevertheless, that all outgoings of the said hereditaments (*i.e.* of each of the three estates respectively) properly chargeable against such arrears and proportions and not discharged in my lifetime shall be paid out of the arrears and proportions to be received by the tenants for life." Now, one thing is clear—viz. that the tenants for life were not in any case to be called upon for more than they received, and it seems to me that, in order to ascertain what the amounts are which each tenant for life received under the bequest, the rents will have to be apportioned. It was only out of what each received that the outgoings were to be paid. If the outgoings properly chargeable against the arrears and proportions of arrears amounted to more than the amount of the arrears and proportions to be received, then the duke's residuary estate had to bear this excess; if they amounted

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up to or to less than the amount to be received the tenants for life had to bear them.

Mr. Justice KEKEWICH has held that the only outgoings as regards the Somersetshire estates which Captain Forester is to bear are those recoverable by process of law as against or in respect of the hereditaments out of which the rents have been derived, and he enumerates them as being rates, taxes, tithe, tithe rent-charge, and other outgoings. I asked during the argument what it was which was recoverable by process of law against arrears or proportions of arrears of rent, and it had to be admitted that there was no such thing. It appears to me that there is also no such thing as an outgoing chargeable against arrears or proportions of arrears of rent, and consequently to make the clause read some words must be understood as being in it. I read the words "All outgoings . . . properly chargeable against such arrears" as meaning, "All outgoings properly chargeable in account against such arrears." This makes sense of the clause and makes it intelligible, which it is not without, and when I bear in mind the manner in which these estates had been and were managed to the knowledge of the duke when he made his will (and this is legitimate evidence when construing the will), I cannot doubt that this is the true reading of this clause. It will be noticed that the outgoings to be paid by the tenants for life are to be those not discharged by the duke in his lifetime. What are they? It seems to me those which the agents were charging the duke with in the ordinary management of the estates, and which in account were set off against the rents received. The duke, by this will, bequeathed to the tenants for life the unreceived income of the respective estates to which they were about to succeed, subject to those burdens which had been incurred in the ordinary and accustomed management of the estates, and which, when he died, he had not discharged, so that each tenant for life was to enter into possession of his estate as a going concern. I should point out that they will not receive the balances in the agents' hands, for they are not "arrears" of rent, but had been received at the date of the duke's death.

I can find in the will no indication that the duke intended to make his residuary estate bear all the accruing burdens, excepting rates, taxes, and tithes, of these three great landed properties,

as held by Mr. Justice KEKEWICH; but, on the contrary, I find him depriving his residuary estate of that income out of which these burdens would ordinarily be defrayed. In my judgment, besides rates, taxes, and tithe and tithe rent-charge due at the duke's death, agents' remuneration, whether paid by way of commission or salary, due at the duke's death, also wages of workmen due at that date, also the cost of repairs which were incident to the proper management of the Somersetshire estates, as carried on by the duke in his lifetime and due at the date of his death, and which are set forth in the statement of facts herein, are chargeable against and must be borne by Captain Forester up to the limit of his receipts, and not by Captain Hay out of the residue. Those commissions, salaries, wages, and cost of repairs which were not due and payable at the death of the duke, though partially earned, and for which Captain Forester has not rendered himself personally liable, in my opinion the executors must pay when they become due, and consequently these fall upon the residue. I am aware that there is a clause in the will which couples "outgoings" with the words "insurance and repairs," and also a clause referring to Raby Castle, but to my mind without these clauses the clause in dispute is to be read as I read it. The point that in the residuary bequest it is provided that the duke's debts were to be paid thereout does not affect my view of the clause in question. If the outgoings properly chargeable in account against the arrears and proportions of rent exceed the rent received, then such outgoings will be a debt of the duke's which his residuary estate must bear, and are therefore provided for by the bequest, but until such time, in my judgment they are not debts of the duke within the meaning of the will, but are liabilities to be borne by the tenants for life.

For these reasons I think that this appeal should be allowed.

DAVEY, L.J.: Reading this clause through without dwelling on the details of the language used, one's impression is that the general intention of the testator was to exclude the Apportionment Act, and to let the devisees into possession of the estates devised to them, including any arrears of rent that might be due, as at his death, but subject to the burden of the liabilities then affecting the ownership of the estates; and this, we think, was the general intention. If we turn to the particular language employed, it, no

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doubt, presents difficulties of construction, but in our opinion, according to its true construction it carries out what I have described as the general impression and scope of the clause reading it as a whole. We think that "all arrears which may be due to my estate" is confined to rents due from the tenants; and indeed the learned counsel who argued this case on behalf of the respondents disclaimed any intention of claiming the balances in the hands of the testator's agents at the time of his death.

The next question is, what is meant by the expression "all outgoings of the said hereditaments properly chargeable against the arrears and proportions and not discharged in my lifetime" which the testator directs to be paid "out of such arrears and proportions." The learned Judge has construed these words as confined to "rates, taxes, tithes, tithe rent-charges and other outgoings (if any) which are recoverable by law as against or in respect of the hereditaments out of which such rents have been derived;" and if we may interpret his order by his reasons, he thinks that outgoings mean those outgoings "which in point of law are attached to the hereditaments"; and by "properly chargeable against," &c., he understands only "such deductions from rent as are generally made or allowed." In our opinion this construction is too narrow. Rates and taxes are usually paid by the tenant, and in some cases deducted from the rent before payment; and as to this no question could arise. If paid by the landlord, they are a debt due from him, and are not in that case deducted from or charged by law against the rent. The same may be said of tithe rent-charge when not paid by the tenant. Previously to the recent Act, which came into operation only a few months before the testator's death, tithe rent-charge could only be recoverable by distress. We think it is permissible to look at other clauses of the will in which the same expression occurs; and we find that the testator in the clause relating to management during minority uses the expression "rates, taxes, costs of insurance and repairs and other outgoings." We are of opinion that the expression "outgoings of the hereditaments" in the clause under consideration ought to be construed in the larger and popular sense, as including every expense relating to this estate which in the ordinary course of management would require to be made in order to maintain the

estate in a fit state to earn rent or would be a proper deduction before ascertaining the net rent receivable as income.

We think also that it is competent for the Court in construing the will to have regard to the testator's mode of management.

The result is that, in our opinion, all such expenses remaining unpaid at the testator's death as in the ordinary course of management would come into charge against the rents due or accruing due at the time of the death, treating each estate as a whole, will be deducted. If they exceed the amount of the arrears and proportions, of course the excess will fall upon the duke's general estate as a debt. This will, in our opinion, include the items numbered (i.), (ii.), (v.), and (vii.) in the summons.

With regard to items (iii.), (iv.), and (vi.), we think the amount due in respect of the work done at the time of the duke's death should come into the account of expenses to be deducted. A distinction has been drawn in argument and in the statement of facts laid before the Court by the trustees between ordinary and extraordinary repairs, and we have felt some doubt whether the expenses of the latter ought to be deducted; but on consideration we think that no distinction between the expenses of the two classes of repairs can be made. They are equally expenditure for the purpose of putting the estate in a condition to earn rent; and we may remark that in each case the tenant for life gets the benefit of the expenditure and in no case can be out of pocket for the cost of them. We are therefore of opinion that the expenditure on so-called extraordinary repairs, so far as incurred in the duke's lifetime and being due in accordance with the contracts under which they were made and unpaid at the time of his death ought to be deducted. If in accordance with the contracts made by the testator, the cost of repairs, whether partially completed in his lifetime or not, would not be payable until after his death, we think that such expenditure would not form the proper subject of deduction under the language of this clause.

With regard to the Raby estates we have no statement of facts before us. We do not know whether any difficulty will arise in applying what we have held to be the proper construction of the clause. The costs in the Court below were ordered to be paid out of the residuary estate. To pay the costs of the appeal in the same manner would be to make the successful appellant pay costs. On

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the other hand, we are not disposed in this case to make the tenants for life pay the costs of an appeal occasioned by the obscurity of the testator's language. We think, therefore, that each party, except the trustees, should pay their own costs of the appeal.

We propose, therefore, to make an order in this form, which I have sketched out subject to any remarks of counsel: Discharge Mr. Justice KEKEWICH's order, except the direction for payment of costs. Declare that, according to the true construction of the will, the tenants for life of the several estates devised by the will in settlement are respectively entitled to the arrears of rent remaining due from the tenants at the time of the testator's death, and the rents accruing due at the date without any apportionment in favour of the testator's estate, and that the outgoings of the devised hereditaments properly chargeable against such arrears and proportions include all such expenses due and remaining unpaid at the testator's death as in the ordinary course of management as carried on by the testator would at the time of his death come into charge against such arrears and proportions of rents accruing due at the time of his death, treating each estate as a whole. Declare that (i.), (ii.), (v.), and (vii.) items in the summons ought to be deducted from the arrears and proportions of rent of the estate devised to the defendant F. W. Forester, and so much of (iii.), (iv.), and (vi.) items as in accordance with the contracts under which the repairs therein mentioned were executed was due and owing at or prior to his death and then remained unpaid, ought also to be deducted, but so much thereof as was not in accordance with such contracts payable until after his death ought not to be deducted. Liberty to apply for an inquiry.

After some further discussion it was by consent ordered that the costs of all parties should come out of the residuary estate, but that the costs of Lord Barnard should be costs in the summons taken out by him.

Appeal allowed.

Solicitors: *Williams & James*, for the Appellant, Captain Hay.
Dawson, Bennett & Dawson, for Captain Forester.
Trower, Freeling & Parkin, for Lord Barnard.
Jennings & Finch, for the Trustees of the Will.

IN RE SHEPPARD'S CORN MALTING CO.
LOWENFELD'S CASE.

1893, November 6. LINDLEY, A. L. SMITH AND DAVEY, L.JJ.

Company — Voluntary Winding-up — Surplus Assets—Distribution — Companies Act, 1862 (25 & 26 Vict. c. 89), s. 133.

A provision in articles of association that if the company should be wound up, and the surplus assets should be insufficient to repay the whole of the paid-up capital, such surplus assets should be applied in repaying to the preference shareholders *pro rata* the amount of capital paid on the preference shares held by them respectively at the commencement of the winding-up, so far as such surplus assets should extend, and that the balance of such surplus assets (if any) should be distributed amongst the ordinary shareholders, does not exclude the general rule established by *Birch v. Cropper*, *In re Bridgewater Navigation Co.* (1), and previous authorities, that the surplus assets of a company are divisible among all the shareholders in proportion to their nominal interest in the subscribed capital of the company.

APPEAL from Vaughan Williams, J.

The nominal capital of the above-named company was 45,000*l.*, divided into 45,000 shares of 1*l.* each, of which 20,000 were preference shares and 25,000 ordinary shares. Of the preference shares 7,993 were issued as fully paid-up shares; 12,007 had calls made upon them in respect of which 13*s.* 4*d.* had been paid up, so that on those 12,007 shares there was a liability of 6*s.* 8*d.* per share.

By clause 5 of the memorandum of association it was provided that the preference shares should rank preferentially to the ordinary shares as to return of capital on the company being wound up.

By clause 6 it was provided that the net profits in each year should be applied: (i.) in payment of a dividend at the rate of 10 per cent. per annum on the amount for the time being credited as paid up on the 20,000 preference shares, and any other preference shares ranking *pari passu* therewith upon an increase of capital; (ii.) in forming a reserve fund; (iii.) in distributing the balance as dividend on the amount for the time being credited as paid up on the ordinary shares.

By clause 147 of the articles of association of the company it was

(1) 14 App. Cas. 525; 59 L. J. Ch. 122; 61 L. T. 621; 38 W. R. 401.

provided that if the company should be wound up, and the surplus assets should be more than sufficient to repay the whole of the paid-up capital, the excess should be distributed among the members in proportion to the amount of capital paid up on the shares held by them respectively at the commencement of the winding-up; and that if the surplus assets should be insufficient to repay the whole of the paid-up capital, such surplus should be first applied in repaying to the preference shareholders *pro ratâ* the amount of capital paid up on the preference shares held by them respectively at the commencement of the winding-up, so far as such surplus assets should extend; and that the balance of such surplus assets (if any) should be distributed amongst the ordinary shareholders.

In February, 1893, it was resolved that the affairs of the company should be wound up voluntarily, and a liquidator was appointed.

The liquidator, in settling the list of contributories, placed the name of one Lowenfeld thereon in respect of his 6,000 preference shares, upon which 4,000*l.* only had been paid.

The liquidator stated that the assets of the company (not including therein the capital remaining unpaid on the 12,007 preference shares) were more than sufficient to pay the expenses of the liquidation and all unpaid liabilities of the company of which he had any knowledge or notice; and that he had therefore no doubt that there would be a surplus applicable towards payment of the preference shareholders after discharging all the expenses and liabilities. He further stated, however, that the surplus would not be sufficient to repay to the preference shareholders the whole of the capital credited as paid on their shares, but that there would be a deficiency of at least 15,000*l.*

For the purpose of adjusting the rights of the preference shareholders *inter se*, some of those shareholders (other than Lowenfeld) required the liquidator to call up the balance remaining in respect of the preference shares.

A summons was accordingly taken out by the liquidator, asking that it might be determined whether he was entitled to make and should make a call on Lowenfeld, requiring him to pay the sum of 2,000*l.*, being the amount remaining unpaid on his 6,000 preference shares.

On 4 August, 1893, the summons came on to be heard before Mr.

Justice VAUGHAN WILLIAMS, who declared that upon the true construction of the articles of association the words "surplus assets" in article 147 did not include uncalled capital; and that the liquidator ought not to make any call upon Lowenfeld in respect of his 6,000 preference shares.

From this decision Paul Krell, one of the holders of fully paid-up preference shares, now appealed.

Sir Arthur Watson, Q.C. (E. C. Macnaghten with him), for the appellant:

In the distribution of the surplus assets in accordance with section 133 of the Companies Act, 1862 (the winding-up being a voluntary one), the general rule should be followed, which was established by *Birch v. Cropper, In re Bridgewater Navigation Co.* (1).

Swinfen Eady, Q.C., and Eve, for the respondent Lowenfeld:

The liquidator is not entitled to call upon Lowenfeld to pay, having regard to the terms of article 147 of the articles of association of the company.

Under the provisions of that article he is not liable to make any further contribution in respect of his shares for the purpose of the adjustment of the rights of the preference shareholders *inter se*. That article means that any profit or loss of capital which may be shown on a winding-up shall be received or borne by members holding preference shares in proportion to the amount of their capital paid up at the commencement of the winding-up; and, except for the purpose of discharging the debts and liabilities of the company, no call shall be made upon the shareholders. Here there are two classes of preference shareholders, and the losses of the company ought to fall in larger proportion on those whose shares are fully paid up than on those whose shares are not fully paid up.

[DAVEY, L.J.: The case of *In re Anglesea Colliery Co.* (2) shows that liquidators are entitled to make a call for the purpose of adjusting the rights of the members, without regard to the amount which they have paid on their shares respectively.]

(2) L. R. 1 Ch. 555; 35 L. J. Ch. 809; 15 L. T. 127; 14 W. R. 1004.

Alexander Young, for the respondent, the liquidator.

Sir Arthur Watson, Q.C., in reply, referred to *In re Hodges' Distillery Co., Ex parte Maude* (3).

LINDLEY, L.J.: This is an appeal by the holder of some preference shares against an order of Mr. Justice VAUGHAN WILLIAMS. [His Lordship stated the facts, read the material clauses from the memorandum and articles of association, and the statement of the liquidator, as above set forth, and continued:] The question is, What is to be done with regard to the distribution of the surplus assets? *Sir Arthur Watson's* client, who is the holder of some of the fully paid-up shares, says that there ought to be a call on those preference shareholders who have not fully paid up their shares; and that the surplus assets when so ascertained should be distributed amongst the preference shareholders in proportion to the shares which they will then have paid up. That involves the whole question. The state of things contemplated in the first part of that article is that you do not want a call at all for the purpose of adjusting the rights of the contributories. The assumption there is that, without any call, you have got surplus assets more than sufficient to pay the whole of the capital. Then you come to the next assumption, namely, that the surplus assets shall not be sufficient; and that is the assumption which we have got to deal with in the present case. Now, what is the true meaning of that provision? I cannot help thinking that in the matter of a call—which call is applicable, as I have pointed out, to a case in which a call may be wanted to adjust the rights of the contributories—the surplus assets include that call if it is wanted. I do not think it is possible to read, in this contingency, “surplus assets” in such a sense as to exclude a call whether or not it is wanted at all. Now, *Mr. Swinfen Eady's* contention amounts to this: He says that, even as amongst the preference shareholders themselves, there is to be an inequality of distribution. Now I cannot find that. I see plainly enough in the memorandum of association that there is to be a preference as regards the distribution of assets—two classes of shareholders, the preference shareholders to be paid first before the

ordinary are paid anything. But I look in vain to find anywhere the slightest evidence of intention that any portion of the preference shareholders shall be in any better position than any other. Is it to be got out of this clause? It appears to me that this clause falls far short of making such a distinction. I read it, and I think the only possible way of working it out, according to the constitution of the company and the language of the clause, is this: In the case of surplus assets, if required for the purpose of adjusting the rights of the contributories amongst themselves, such surplus assets, including the produce of those calls, shall first be applied in repaying to the preference shareholders *pro ratâ* the amount of capital paid up on the preference shares held by them—not paid up at the commencement of the winding-up, but after the call has been made and after all payments have been made. I see no difficulty in that. It does not follow that all calls made will be paid, and the distribution is to be made *pro ratâ* and according to the capital which the shareholders do pay up, and not merely that which they ought to pay. That is a perfectly plain signification, and any surplus after that is to go to the ordinary shareholders. I therefore think that Mr. Justice VAUGHAN WILLIAMS has arrived at an incorrect construction of this clause. The absurdity which he points out will not arise if you construe the clause as we are inclined to construe it, although it would if construed as he has done. The mistake he has fallen into is that he has regarded the amount of capital paid as the amount of capital paid up at the commencement of the winding-up. That is not what is stated. It is the amount of capital held at the commencement of the winding-up. For these reasons, bearing in mind that the consequence of *Mr. Swinfen Eady's* argument would be to create two classes of preference shareholders, which to my mind is entirely contrary to the constitution of the company, I think that this appeal should succeed.

A. L. SMITH, L.J.: It appears to me, two points are necessary to be considered in the present case. The first is, what is the meaning of "surplus assets;" and the next is, to what period of time do the words "paid-up" in article 147 apply? The learned Judge in the Court below held that *primâ facie* "surplus assets" meant the surplus of assets that the liqui-

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dator might have or the company might have after it had paid all its debts and liabilities, including all the costs of the winding-up, if there was a winding-up, and that what was over and above would be called "surplus assets;" and that *primâ facie* if there were amongst those assets unpaid calls due from shareholders, they would form part of the surplus assets; but that at the same time you must take care that article 147 has not cut down what is the ordinary meaning of "surplus assets." Mr. *Swinfen Eady* says that in this article 147 there is a special contract that on the winding-up the shareholders are not called on to pay up calls not due on fully paid-up shares which they might hold. The question is, is that made out? Mr. Justice VAUGHAN WILLIAMS based his judgment upon this, that the words "paid up on the shares held by them respectively at the commencement of the winding-up" must be read as "paid up at the commencement of the winding-up." He said it would be most absurd to make a call on a shareholder to pay up so much as to make a non-paid-up share a fully paid-up share, and then distribute the assets to him as if it had been a fully paid-up share. He says that would be so unjust that he really cannot think the words "surplus assets" could have the meaning which *primâ facie* they would otherwise have. Is Mr. Justice VAUGHAN WILLIAMS well founded in that? I do not think he is. I agree with Lord Justice LINDLEY that the words "shall be distributed amongst the members in proportion to the amount of capital paid up on the shares held by them respectively at the commencement of the winding-up" mean paid up not necessarily at the commencement of the winding-up, but paid up at any time, whether under a call or not. And having arrived at that conclusion, it seems to me that I must necessarily differ from the judgment of my learned brother, VAUGHAN WILLIAMS, and hold that the construction he has put on that part of the article is erroneous. I come to the conclusion, therefore, that it is not made out that there is a context in this article cutting down what is the ordinary and general meaning of "surplus assets;" and that a call ought to be made, and that the shareholder on whom the call is made will be entitled to participate in what is coming—that is to say, by paying the 6s. 8d. in addition to the 13s. 4d. he has already paid.

DAVEY, L.J.: I am of the same opinion, and if we were not differing from the judgment of the Court below, I do not think I should add anything to the reasons already given. There is no doubt about the general rule, that where there are assets of the company which may be called "surplus assets," they are after the discharge of all debts and liabilities. That rule is stated in *In re Anglesea Colliery Co.* (2), in which it was held that the liquidators were entitled and justified in making a call upon the partly paid-up shareholders for the purpose of adjusting the rights between them and the fully paid-up shareholders. The same proposition was also maintained in *Ex parte Maude* (3), and subsequently and recently has received the approval of the House of Lords in the case which has also been referred to of *Birch v. Cropper* (1). So that there is no doubt about the general rule. Do we find anything in the present case excluding the general rule? We find that excluded as between the preference and the ordinary shareholders. But *Mr. Swinfen Eady*, as I understand, seeks to go further, and says that there are two classes of preference shareholders; and that the losses of the company ought to fall in a larger proportion on those whose shares are fully paid-up than on those whose shares are not fully paid-up. The question, therefore, is whether that is so according to the true construction of this article 147. The learned Judge has held—and I certainly do not quite understand the declaration; I understand the substance of it, but I do not quite understand the form—that the surplus assets do not include uncalled capital. I suppose he means by that, and from his judgment, to say that surplus assets do not include capital which has been called up, or may be called up, for the purpose of adjusting the rights of the contributories *inter se*, because undoubtedly the surplus assets conceivably consist wholly of capital which was uncalled at the commencement of the winding-up, and had been called during the winding-up. If, for example, the case which was put in *Ex parte Maude* (3), and again put in *Birch v. Cropper* (1), was that where the exigencies of the winding-up required immediate payment (although the assets required some time for realization), it would be the duty of the liquidator to call up the uncalled capital, and afterwards to realize the property. If the property when realized were sufficient to discharge all the debts and liabilities, it is perfectly obvious that

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the so-called surplus assets would consist of entirely uncalled capital. Therefore I can only understand the learned Judge's declaration as meaning that it does not include capital to be called up for the purpose of equalizing the rights of the contributories *inter se*. Now I wish to observe that it is just as much a purpose of the liquidation and the duty of the liquidator to equalize the rights of the contributories *inter se*, as it is to pay the debts and liabilities; and he has equal power to make a call for the one purpose as the other. Indeed, I would say that it is equally his duty to make a call for the one purpose as for the other. Therefore, if you get to this, that surplus assets include capital which has been or may have been called up for the purpose of paying the debts and liabilities, I cannot see on what rational ground you can exclude from the surplus assets capital called up for another purpose of the liquidation. *Primâ facie* surplus assets include all capital which has been realized by means of either selling the assets or of enforcing the liability of the shareholders during the progress of the liquidation after the debts and liabilities in the course of the winding-up have been discharged. Now, it will be observed that the first limb of the sentence as between the preference shareholders gives exact expression to what I have said is the general rule of law to be deduced from the authorities to which I have referred. Then do we find anything in the second limb of the sentence which alters the meaning? I think not. It may be said that in the first limb of the sentence surplus assets do not include capital called up for the adjustment of the rights of the parties, but that is on account of the context, because *ex hypothesi* such a call may not be wanted. But, in the second limb of the sentence, where a call might be wanted, as Lord Justice LINDLEY has said, I see no reason for giving the term "surplus assets" any other than its *primâ facie* obvious and well-established meaning in such cases. Then it was said by Mr. Swinfen Eady that the surplus assets are to be applied in paying the preference shareholders *pro ratâ* on the amount paid up by them—that is to say, *pro ratâ* on the amount of capital paid up on the shares held by them. It seems to me perfectly accurate. One shareholder might hold 100 shares, another might hold ten, and another 500, and the payment would be *pro ratâ* on the amount

of capital paid up on the shares respectively held by them. What does "paid up" mean? The learned Judge in the Court below has construed the words "at the commencement of the winding-up" as applicable to the words "paid up." I agree with the rest of this Court that that is not the right construction; and having arrived at that construction the learned Judge has said that there would be a manifest absurdity if he held the "surplus assets" as including calls made upon the shareholders. As I do not agree in his premises, I need not say anything about the absurdity. But I wish to point out that this would be the result if it was so, that if calls have been made for the purpose of paying debts and liabilities the shareholders who paid those calls would not get them back at all, because the distribution is to be according to the amount paid up at the commencement of the liquidation. Therefore, if these shareholders whom *Mr. Swinfen Eady* represents paid only 13s. 4d. on their shares and had the other 6s. 8d. called up for the payment of debts and liabilities, they would still, according to the learned Judge's construction, not have been entitled to share in the surplus assets in respect of that 6s. 8d. which they had paid during the liquidation for the purpose of the debts and liabilities. Therefore I cannot help thinking that the learned Judge's construction really involves, I will not say an injustice, but something which the parties could not have agreed to, and which it is extremely unlikely to suppose that any sane man of business would agree to. I should construe the words "paid up" as that which has been properly called up and paid either before or in course of the liquidation. And if we are right in thinking that there is nothing to exclude the duty of the liquidator to make such calls which are necessary for the purpose of adjusting the rights of the parties *inter se*, then this called capital which is paid up for that purpose will constitute part of the amount paid up on the shares; that is to say, the amount paid up on the shares after everything has been done which ought to have been done. I think, therefore, the learned Judge's order cannot be maintained, and that we ought to make a fresh order.

Appeal allowed.

Solicitors: *Milne & Milne*, for the Appellants.

A. Arnold Hannay; Last & Sons, for the Respondents.

IN RE LOW, BLAND v. LOW.

1898, November 1, 15, 27. LINDLEY, A. L. SMITH AND DAVEY, L.JJ.

Administration Action—Proof—Res judicata—Scotch Judgment—Registration in England—Debt Barred in England by Statute of Limitations—Judgments Extension Act, 1868 (31 & 32 Vict. c. 54), s. 3.

Where a creditor, whose claim had been disallowed as barred by the Statute of Limitations in an administration action in England, obtained a decree for the amount of his claim and costs in a Scotch action and registered such decree in the Queen's Bench Division, the assets in the administration being still unadministered:—

Held, that the Scotch judgment when registered was a new cause of action, and, such cause of action not being barred by the Statute of Limitations and not having been adjudicated upon, the judgment creditor, though not entitled to issue execution against the assets, was as of course entitled to be admitted to prove for his debt in the administration.

Phosphate Sewage Company v. Molleson (1) distinguished.

APPEAL from North, J.

One John Low, who was the father of the deceased, John Houston Low, whose estate was being administered in the action, lent him money on one or more I O U's. John Low lived in Scotland. The deceased lived in England, and died domiciled in England, having property both in England and in Scotland, but principally in England. The defendant was his administratrix in England. John Low could not enforce payment of his debt in England, being barred by the English Statute of Limitations; but he could enforce payment in Scotland, his debt not being barred by lapse of time according to the law of that country. Accordingly, on 13 December, 1892, he brought an action in Scotland against the defendant, as administratrix of her husband, and claimed over 400*l.*, and on 1 February, 1893, judgment was signed against her in her absence for this amount. She afterwards applied to the Scotch Court to set aside this judgment, and for leave to defend the Scotch action, and on 14 February, 1893, this application was granted. She then defended the action. By her pleadings she denied the debt, asserted that it was barred by lapse of time, denied assets sufficient to pay it, and relied on the fact that a

judgment had been obtained in England for the administration of the estate of the deceased. John Low then reduced his claim to 270*l.*, and he recovered judgment against the defendant for this amount, with costs, on 30 May, 1893. That judgment was in form for payment by her of 270*l.* and (by her as administratrix) of the costs. But it had been since ascertained, and was now, on the appeal, conceded, that the judgment was only against the defendant as administratrix, both as regarded the principal sum and as regarded the costs.

Immediately after the proceedings had been thus commenced in Scotland—viz. on 17 January, 1893, one Bland, a creditor of the deceased, brought this action, in this country, against the defendant for the administration of the estate, and on 20 January, 1893, the usual administration judgment was pronounced. In March, 1893, John Low sought to prove his debt in the administration action, but, the debt being barred, the chief clerk disallowed the claim, and declined to allow the claim to stand over until the result of the Scotch proceedings should be known. He gave John Low further time to support his claim, but he, being unable to take his case out of the statute, filed no further evidence, and on 1 May, 1893, the chief clerk made a certificate disallowing the debt. (No application had been made to vary this certificate.) Meanwhile, the Scotch proceedings had been going on. No application was made by the parties to the English action to restrain John Low from proceeding with his Scotch action, or to restrain him from registering his judgment under 31 & 32 Vict. c. 54, s. 3, and on 22 July, 1893, he duly registered a proper certificate of his Scotch judgment under that Act.

John Low having threatened to issue execution against the assets of the deceased, the defendant applied for and obtained an injunction to restrain him from carrying out his threats. But the injunction was so worded that it might prevent him from proving against the estate of the deceased in the administration action, and the judgment of NORTH, J., who granted the injunction, was in effect a decision that, although John Low had obtained and registered his Scotch judgment for 270*l.* and costs, he was not entitled to prove in respect of that judgment in the administration action. Practically, therefore, it had been decided that John Low was not entitled to be paid his judgment debt out of the

deceased's assets in England. No order on further consideration had yet been made. The assets had not yet been distributed, and it was admitted that there were no unpaid creditors except John Low and the plaintiff Bland, and that the English assets would probably be enough to pay John Low in full, or nearly so. Mr. Justice NORTH decided against John Low being entitled to prove his judgment debt in the administration action on the ground that his claim was barred by the Statute of Limitations and was *res judicata*.

John Low appealed.

Swinfen Eady, Q.C., and F. Thompson, for the appellant :

The appellant is entitled to prove for his debt in the administration.

Cozens-Hardy, Q.C., and Gatey, for the respondent :

The matter is *res judicata*. The appellant is precluded by the chief clerk's certificate.

[The COURT referred to *Phosphate Sewage Co. v. Molleson* (1) and *North v. Stewart* (2).]

Swinfen Eady, Q.C., replied.

Cur. adv. vult.

November 27.

LINDLEY, L.J. : The question raised by this appeal is whether John Low, who has obtained judgment in Scotland against the defendant, as administratrix of her deceased husband, is entitled to be paid the amount of the judgment out of his assets, which are being administered in the Chancery Division of the High Court in this country. The case is a very peculiar one, and dates are important.

[His Lordship stated the facts as set out above, remarking that the parties to the English action might have applied to restrain John Low, the plaintiff in the Scotch action, as in *Graham v. Maxwell* (3), from proceeding with the Scotch action, or from

(2) 15 App. Cas. 452; 63 L. T. 718.

(3) 1 Mac. & G. 71; 18 L. J. Ch. 225.

registering his judgment when obtained, but they did not do so, and whether or not he could have been restrained, Low was entitled to whatever advantages the registration gave him ; and proceeded :] The mere fact that the time for carrying in claims has expired is of no consequence. The assets being undistributed and available for the payment of John Low's debt, it would be a matter of course to pay it, and, if necessary, to extend the time for proving it before the chief clerk and for including it in his certificate if the debt ought really to be paid out of the assets in this country. The question we have to determine is whether he is entitled to prove his judgment debt in the administration action. Mr. Justice NORTH decided that he was not on the ground that his claim was barred by the Statute of Limitations, and was *res judicata*. I cannot concur in this view.

John Low's present claim is not based on his original cause of action, but on the Scotch judgment, which is a very different thing. The original cause of action is, no doubt, barred, and has been adjudicated upon in the English action ; and the decision upon it was, moreover, quite correct. Nothing, therefore, would be gained by extending the time for a motion to vary the certificate of the chief clerk in disallowing John Low's claim as presented to him. But the Scotch judgment, when registered under the Act 31 & 32 Vict. c. 54, gives a new cause of action which is not barred by the Statute of Limitations, and which has not yet been adjudicated upon. Whether the chief clerk's certificate could have been pleaded in the Scotch action as *res judicata* I do not stop to inquire. It is quite plain that it could not be so pleaded to an action in this country on the Scotch judgment now that it has been registered. The effect of the Scotch judgment, when registered under the Act 31 & 32 Vict. c. 54, is the same as that of an English judgment. The language of section 3 is very clear upon this point. The language is, that the certificate of the Scotch judgment, when registered, "shall from the date of such registration be of the same force and effect as a judgment obtained or entered up in the Court in which it is so registered, and all proceedings shall and may be had and taken on such certificate as if the decree of which it is a certificate had been a judgment originally obtained or entered up on the date of such registration as aforesaid in the Court in which it is so registered." The judgment, therefore,

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must now be regarded as an English judgment. But the registration cannot wholly alter the nature and character of the judgment registered; and, if the Scotch judgment is only for a particular mode of applying Scotch assets, registration under the statute would not change its character and convert it into a judgment for the application of English assets in the same way. The object of the statute is simply to prevent the necessity of bringing several actions in England, Scotland, and Ireland, instead of one, in order to establish a right to be enforced anywhere within Great Britain and Ireland. The Scotch judgment orders the defendant to pay the plaintiff 270*l.* and costs out of the assets of the deceased. The Scotch Court cannot reach assets out of Scotland, but it can investigate and adjudicate upon claims against the estate of a deceased person whose legal personal representative is properly before the Court. This is what the Scotch Court has done. The Scotch judgment has established the plaintiff's claim to the extent of 270*l.*, and has adjudicated him to be a creditor for that amount against the defendant, as the legal personal representative of the deceased. The registration of this judgment under the statute converts the plaintiff into an English judgment creditor for the same amount, to be paid by the defendant as the legal personal representative, or, in other words, out of the personal assets of the deceased. If the plaintiff had obtained an English judgment to this effect, he would clearly be entitled to prove in respect of it in the administration action. The judgment could not be disregarded on the ground that the action in which it had been obtained might have been restrained by injunction, and ought not to have been brought; nor would it be any answer to the judgment creditor, seeking to prove his debt, to say that the original cause of action was statute-barred or had been disallowed by the chief clerk, whose certificate had not been varied. The judgment would give a new cause of action, a new ground of claim, to the judgment creditor, and the judgment debtor could not dispute it, except by taking proceedings to impeach the judgment itself. So in the present case, unless the registration of the Scotch judgment can be set aside, and until it is set aside, John Low is entitled to the benefit of it. If the defendant had allowed the first Scotch judgment of

1 February, 1893, obtained against her in her absence, to stand, that judgment could not have been registered in this country (4), and it would have been of very little use here (see *In re Boyse*) (5). But, as already stated, the defendant fought the case in Scotland, and omitted to apply for an injunction to restrain the Scotch action or the registration in this country of the judgment ultimately recovered against her there. I am not aware of any principle on which John Low can now be deprived of the benefit of this registration. He is in the same position as if he had sued the defendant in this country, and had not been stopped by injunction, and had obtained judgment against her in her representative capacity. In such a case, although execution would be stayed, the judgment creditor would be admitted to prove his debt in the administration action as a matter of course, so long as there were assets still undistributed and under the control of the Court in that action.

This decision is in no way opposed to *Phosphate Sewage Co. v. Molleson* (1), for the decree in Chancery to which the Scotch Courts refused to give effect, in preference to a prior decision of their own, was not relied upon or treated as equivalent to a subsequent Scotch judgment. The case did not turn on the statute to which I have alluded and which governs the present case.

The order appealed from must be varied by adding, "but the appellant John Low is to be admitted in the administration action as a creditor for the amount of his judgment debt and the costs of registering the Scotch certificate." The rest of the order appealed from will stand, as the appellant had no right to enforce his judgment, as he threatened to do. He ought, however, to have the costs of the appeal, for he has succeeded in establishing his right to be paid his judgment debt, which the defendant denied, and which the order appealed from prevented.

A. L. SMITH, L.J. : I concur.

DAVEY, L.J. : I agree with the judgment which we have heard,

(4) 31 & 32 Vict. c. 54, s. 8.

(5) 15 Ch. D. 591; 49 L. J. Ch. 689.

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and should not add anything were it not that we are differing from the Judge below.

In this case the real and substantial question which we have to decide is whether the appellant is entitled to have a judgment which he has obtained in the Court of Session in Scotland, and which has been duly registered in accordance with the Judgments Extension Act, 1868, satisfied out of the assets of John Houston Low, deceased, in the hands of the respondent.

[His Lordship referred to the facts, remarking that the judgment *in absentia* obtained by the appellant on 1 February, 1893, in the Scotch action would have been, of course, effective against the Scotch assets, though they might be small, but it could not have been registered under the Judgments Extension Act, 1868 (see section 8), and thereby have acquired the force and effect of an English judgment, and it would at most have been *prima facie* evidence of debt in an English Court: *In re Boyse* (5); and that the action of the respondent in then moving to discharge that judgment in order to defend the action was inconsistent with her present pretension to treat the Scotch action as a nullity; and further, that the respondent might, if she had been so minded, have moved to restrain the appellant from proceeding with his Scotch action (see *Graham v. Maxwell*) (3), but neither did that nor applied to restrain him from registering his judgment when obtained. His Lordship proceeded:] The question is whether Mr. Justice NORTH ought to have made the order without giving the appellant liberty to carry in a proof on his registered judgment against the assets in the hands of the administratrix, notwithstanding the certificate. I am of opinion that such liberty should have been given. The respondent's contention is that the matter is *res judicata* and that the appellant is concluded by the certificate. Now, in the first place, I am of opinion that the certificate was quite right, but that all that was determined by it was that the appellant was barred of his remedy in an English Court. There was no decision on the merits or existence of his claim. It is familiar law that a statute which bars the remedy without extinguishing the right is part of the *lex fori* only and mere matter of procedure in that particular Court (see *Harris v. Quine*) (6). In the next place, this is not in

(6) L. R. 4 Q. B. 653; 38 L. J. Q. B. 331; 20 L. T. 947; 17 W. R. 967.

fact the same claim as was disallowed by the chief clerk. This is a claim founded on a judgment which is a new cause of action. We are bound by the statute to give the judgment the same force and effect as if it had been obtained in an English Court. No attempt has been made, or, so far as I can see, can be made, to set aside the registration, and, while the certificate exists, effect ought to be given to it, and I can see no equity that the administratrix has to deprive the appellant of his legal rights. This is not a case in which there is any competition between creditors, or in which the appellant is seeking to obtain any priority by reason of his judgment over other creditors or to interfere with the equal distribution of the estate between creditors, and the question is exclusively between him and the administratrix, and, but for the administration action, there could be no question of his right to have his registered judgment satisfied out of the assets.

In the course of the argument, a case of *Phosphate Sewage Co. v. Molleson* (1), reported at various stages, was referred to. The facts in that case have a superficial resemblance to the present case, but when closely examined are, in my opinion, substantially different. In that case the House of Lords held that the Scotch Court, exercising an exclusive statutory jurisdiction in bankruptcy, had a discretion whether they would adjudicate on a claim against the bankrupt's estate at once or would wait to inform themselves by the result of an English suit in which the claim against the bankrupt's estate was mixed up with that against several other defendants, and that the Scotch Court had rightly exercised such discretion in investigating and deciding the claim for themselves on its merits. This judgment of the Scotch Court on the merits in Scotch bankruptcy was the one relied on and upheld by the House of Lords as *res judicata* in the second case, and there was not and could not be in that case any judgment of the English Court capable of registration and acquiring the force and effect of an English judgment, for the simple reason that an English Court had no jurisdiction to decide a question of proof in a Scotch bankruptcy. I do not, therefore, think the case in the House of Lords is any binding or guiding authority to us in the case now before us.

I think that the injunction is too broad. It would restrain the appellant from issuing execution against the defendant personally,

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and I think that if he is entitled to do so he cannot be restrained from doing so. I also think that it should not extend to any assets there may be in Scotland. And, for the reasons I have stated, I think it should be prefaced by liberty being given to the appellant, notwithstanding the certificate and without disturbing any payment or any order which may have been already made for payment out of the estate (if any such has been made), to prove upon the certificate of registration of his judgment granted on 22 July, 1898.

I much regret the waste of this small estate in the costs of these double proceedings, for which the respondent and administratrix are responsible. As the appellant was wrong, and the injunction was rightly granted, I think the order upon the appellant for payment of the costs in the Court below should stand, but he should have his costs of this appeal from the respondent, because I think that the injunction should only have been granted on terms.

Order varied.

Solicitors : *W. T. Wilkinson*, for the Appellant.

Harrison & Powell, for *C. H. Moordaff*, Kington, for the Respondent.

MELLIN v. WHITE.

1894, May 8, 9. LINDLEY, LOPES AND KAY, L.JJ.

Libel—Slander of Title—False and disparaging Statement—Damage—Injunction.

A retailer of goods must not attach to the goods, when sold by him, false and disparaging statements in commendation of rival goods of his own make. Such conduct may be restrained by injunction on proof that the statement is false, disparaging and calculated to damage the manufacturer.

APPEAL from Romer, J.

The plaintiff was proprietor and manufacturer of "Mellin's Infant Food," and the defendant, a chemist, was the proprietor and sole

manufacturer of "Vance's Food for Infants and Invalids." The defendant was in the habit of purchasing quantities of Mellin's Food from the plaintiff, who sold it wholesale, and reselling it with a label to the following effect attached to the plaintiff's wrapper upon each bottle: "Notice. The public are recommended to try 'Dr. Vance's Prepared Food for Infants and Invalids,' it being far more nutritious and healthful than any other preparation yet known."

On 28 July, 1893, the plaintiff commenced this action against the defendant, alleging that the label was intended to disparage Mellin's Food, and claiming an injunction to restrain the defendant from selling or offering for sale the plaintiff's food otherwise than under the original wrappers, and from selling or offering for sale such food under the plaintiff's wrappers, with any unauthorized additions or alterations, and from untruly representing that the plaintiff's food was less nutritious or healthful than Dr. Vance's Food. The plaintiff also claimed damages.

At the trial on 3 April, 1894, ROMER, J., at the close of the plaintiff's case, gave judgment for the defendant, and dismissed the action, holding that what the defendant had done did not amount to a trade libel. The plaintiff appealed.

Moulton, Q.C., and A. àB. Terrell, for the appellant:

The statements in the label are made distinctly in connexion with the plaintiff's food, and amount to an assertion that it is less "nutritious and healthful" than Vance's Food. But the medical evidence is that starchy foods, like the defendant's, are really not foods at all for infants under the age of six months, and that one-third of the deaths of such infants are caused by improper food, and for the most part by starchy foods. The label, therefore, is highly disparaging to the plaintiff's food. Its statements are also proved to be false, and they must, if allowed to be continued, cause damage to the plaintiff.

[They cited *Western Counties Manure Co. v. Lawes Chemical Manure Co.* (1) and *Young v. Macrae* (2).]

(1) L. R. 9 Ex. 218; 43 L. J. Ex. 171; 23 W. R. 5.

(2) 3 B. & S. 264; 32 L. J. Q. B. 6; 7 L. T. 354.

[LOPES, L.J., referred to *Burnet v. Wells* (3) and *Ratcliffe v. Evans* (4).]

Neville, Q.C., and *Macnaghten*, for the respondent.

[LINDLEY, L.J.: Can you resist a new trial?

LOPES, L.J.: I think this is not properly an action for slander or for libel, but an action on the case for acts maliciously done.]

A dealer might certainly tell a customer verbally that Vance's Food was better than Mellin's, and that would be substantially the same as what the defendant has done.

There is no evidence of damage.

Moulton, Q.C., in reply:

It was never suggested in the Court below, and it certainly never occurred to the learned Judge, that the defendant's statement could fail to be injurious. Had it been suggested, evidence of damage might have been given. It is plain that such a statement must cause damage.

LINDLEY, L.J.: I think in this case the learned Judge has gone a little too far in giving judgment for the defendant on the materials which were laid before him, for he appears to have proceeded upon the basis that even if the plaintiff's evidence stood uncontradicted this action could not, in point of law, be sustained. It appears to me that the defendant has brought upon himself a new form of attack by adopting a new mode of carrying on business. Nobody in this Court, at all events, has ever seen or heard of a tradesman selling goods like Mellin's Food with a label, and putting on another label which disparages the bottle. I do not say at this stage that what has been done is illegal, but I do say that the learned Judge has been a little too quick, and if upon hearing the whole of the evidence the result should be that the statement contained in the label complained of is a false statement about the plaintiff's goods, and one which causes or is calculated to cause damage to the plaintiff in his business, I think the action will lie. The law

(3) 12 Mod. 420.

(4) [1892] 2 Q. B. 524; 61 L. J. Q. B. 535; 66 L. T. 794; 40 W. R. 578.

applicable to the case is to be found in the following cases : *Western Counties Manure Co. v. Lawes Chemical Manure Co.* (1), *Thomas v. Williams* (5), *Ratcliffe v. Evans* (4) ; and it is having regard to those decisions that I have enunciated the proposition that a false statement disparaging the plaintiff's goods, and calculated to cause damage, is actionable.

What we propose to do is this : we must discharge the order, direct a new trial, and order the costs of the previous trial and of this appeal to abide the issue. We leave it to the learned Judge to decide whether he will try the case himself or send it to a jury.

LOPES, L.J. : All I desire to say is that, in my opinion, the real ground of this action was for maliciously and without lawful occasion making a false statement disparaging the goods of another person, and causing, or likely to cause, damage to such person. Provided that can be made out, I think the action for an injunction will lie. But all these matters, so far as we know, are undecided. They have not been proved. Whether or not the statement is false we are not in a position to say. Evidence to that effect was given by the plaintiff, but, for anything I know, the defendant may be able to show that the evidence given by the plaintiff is incorrect, and that no false statement at all has been made.

Then there is another question as to what the consequences are if a false statement disparaging the goods of the plaintiff has been made—what the effect of that has been upon the plaintiff's goods. To maintain an action at the common law for such a false statement actual damage must be made out ; but it is not necessary to show actual damage in an action for an injunction. It is enough to show that what has been done is likely to cause damage. I think, as I said during the argument, that if the defendant has published without justification a false statement about the plaintiff's goods which causes or is likely to cause damage, the action will lie, and it does appear to me that the statement we have to deal with raises a question well worthy of consideration, as to whether damage may not be inferred from the circumstances without actual proof.

KAY, L.J. : I will only say that I concur, because I do not wish

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to say anything which may make it appear that I have formed any concluded opinion on the case. Whether or not this statement does disparage the plaintiff's goods, whether or not the statement is false, and whether or not it is calculated to produce damage, are all questions which, as far as I can see, are entirely open. I can only say that I think the case was not completely tried before the learned Judge. I agree that the costs ought to abide the result of the new trial.

Appeal allowed; new trial ordered.

Solicitors: *Eldred & Bignold*, for the Appellant.

A. W. Mills, for the Respondent.

CARTER v. FEY.

1894, May 22. LINDLEY, LOPES AND DAVEY, L.JJ.

Practice—Action—Motion by Plaintiff for Injunction before Statement of Claim delivered—Cross-motion by Defendant—Judicature Act, 1873, s. 24, subs. 7—Rules of the Supreme Court, 1883, Order L. r. 6.

A defendant who has appeared cannot, where no statement of claim has been delivered, move for an interlocutory injunction where the relief which he seeks is not incidental to or does not relate to or arise out of the relief sought by the plaintiff's action; but he must either wait till he can put in a counterclaim or issue a writ in a cross-action.

Relief against breach by the plaintiff of a covenant not to use the defendant's name in carrying on a business which had formed the subject of partnership between the plaintiff and the defendant is not incidental to relief sought in an action by the plaintiff for breach by the defendant of a covenant not to carry on a like business within a certain radius, though both covenants are contained in the deed of dissolution of partnership.

Sargant v. Read (1) distinguished.

APPEAL from Kekewich, J.

The plaintiff and the defendant had been partners as wine and spirit merchants at Winchester. The partnership was dissolved by consent, and by a deed of dissolution dated 12 May, 1893, it was provided that the plaintiff might carry on the business, and that

the defendant's name should be expunged from the name of the firm and should not be used on vans, van-covers, or trucks, or on any signboards, labels, price lists, or other advertisements belonging to or issued by the plaintiff. It was further agreed that the defendant should not, for the space of five years, either directly or indirectly, enter into or carry on or assist in carrying on the business of a wine, ale, beer or spirit merchant in the said city of Winchester, or within two miles thereof, to be reckoned from the Butter Cross, under a penalty of 500*l*.

On 11 April, 1894, the plaintiff issued a writ claiming a perpetual injunction to restrain the defendant from either directly or indirectly carrying on or assisting in carrying on the business of a wine and spirit merchant within the city of Winchester or two miles thereof, in breach, as the plaintiff alleged, of the covenant in that behalf; and the following day he gave notice of motion for an interim injunction in the terms of the writ.

The defendant denied the breach and thereupon, having entered an appearance, on 17 April gave notice of motion for an injunction against the plaintiff to restrain him, until further order, from using or permitting to be used the name of the defendant on vans, van-covers and trucks belonging to the plaintiff or otherwise in carrying on his business, and for an order directing the plaintiff to expunge the defendant's name from the name of the plaintiff's firm. No statement of claim was delivered, and the motions came on for hearing together on 27 April, when a preliminary objection was taken on behalf of the plaintiff that the defendant's motion was for relief, which was outside the action altogether, and that it could not, therefore, be entertained, and that the defendant must proceed by way of counterclaim in due course or issue a writ in a cross-action, whereupon KEKEWICH, J., refused the defendant's motion with costs, making no order upon the plaintiff's motion.

The defendant appealed.

E. Le Riche, for the appellant :

Order L. r. 6 (2) says in almost actual words that the defen-

(2) Order L. r. 6 of the Rules of the Supreme Court. 1883, provides as follows :—

“ An application for an order under section 25, subsection 8 of the principal Act may be made to the

dant's motion may be made; it may be made by "any party," which must include a defendant: *Sargant v. Read* (1).

[LOPES, L.J., referred to *Porter v. Lopes* (3).

LINDLEY, L.J.: I thought this had been done frequently.]

The learned counsel was stopped by the Court.

[LINDLEY, L.J., addressing counsel for the respondent: How do you get over Order L. r. 6 (2) ?]

S. Dickinson, for the respondent:

I do not get over Order L. r. 6 (2) at all. I only say it is not a question here of the Judge's discretion. The cases in which the discretion has been exercised are cases where the Court had seisin of the whole matter. There is no case where an injunction has been granted to a defendant where the Court would not grant it as arising out of the plaintiff's claim, which is the case here. If it was the trial of the action the Court could not grant this injunction. The defendant's claim is something outside the plaintiff's action altogether. The utmost that the defendant can get upon the plaintiff's claim is to have the action dismissed with costs; if he wants more he must counterclaim or issue a writ in a cross-action. That is the meaning of *Sargant v. Read* (1).

Le Riche, in reply:

Mr. Justice KEKEWICH was wrong in holding that the defendant was not entitled to be heard till he had issued a writ; he was bound to hear the defendant, after which he could, if he thought fit, refuse to grant the injunction, but he was wrong in saying that the issue of a writ in a cross-action was a condition precedent. A counter-

Court or a Judge by any party. If the application be by the plaintiff for an order under the said subsection 8, it may be made either *ex parte* or with notice . . . and if it be by any other party then on notice to the plaintiff and at any time after appearance by the party making the application."

Subsection 8 of section 25 of the Judicature Act, 1873, provides that "an injunction may be granted . . . by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just and convenient that such order should be made . . ."

(3) 7 Ch. D. 358; 37 L. T. 824.

claim cannot be put in, because no statement of claim has been delivered, and the defendant ought not to have the relief he is entitled to delayed till one has been delivered. Under subsection 7 of section 24 of the Judicature Act, 1873 (4), the Court has power to grant remedies in respect of any claim "properly brought forward," which means nothing more than "in accordance with the rules." The defendant has "properly brought forward" his claim. His claim is one that would form a proper subject for counterclaim in the plaintiff's action; that being so, it proves his right to move for an injunction, for it shows that his claim is germane to the action.

[LOPES, L.J.: The defendant's claim is one which he could not raise as an issue in the plaintiff's action; he could not by his defence.]

Sargant v. Read (1) is entirely analogous to the present case. Without hearing the defendant's evidence, Mr. Justice KEKEWICH was not in a position to say whether his claim was or was not a just and convenient one.

LINDLEY, L.J.: This appeal has raised a point of practice which is open to some little difficulty, and is, besides, a new and important one. It is whether the defendant, who wants immediate assistance without having to wait for it, can apply by way of motion in the plaintiff's action for an injunction without first delivering a counterclaim or issuing a writ in a cross-action when the relief which he seeks is not included in the action brought by the plaintiff.

The plaintiff and the defendant were in partnership as wine and spirit merchants. The partnership was dissolved, and a deed of dissolution entered into. Then the plaintiff issued a writ claiming

(4) Subsection 7 provides that:—
"The High Court of Justice and the Court of Appeal respectively, in the exercise of the jurisdiction vested in them by this Act in every cause or matter pending before them respectively, shall have power to grant and shall grant, either absolutely or on such reasonable terms and conditions as to them shall seem just, all such remedies whatsoever as any of the

parties thereto may appear to be entitled to in respect of any legal or equitable claim properly brought forward by them respectively in such cause or matter; so that, as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided."

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a perpetual injunction to restrain the defendant from either directly or indirectly carrying on business within a certain radius in contravention, as he alleged, of a covenant in the deed, and then he moved for an interim injunction in the terms of the writ. What the plaintiff wants is what he has claimed in his writ; that is all. His action is not for administration of the partnership estate or for taking partnership accounts or for dissolution, but simply to restrain the defendant from carrying on business in the way complained of. The defendant met the plaintiff's motion by affidavits, in which he made a case that the plaintiff ought not to have the relief he sought, because he also had been guilty of a breach of a covenant in the defendant's favour in the same deed, whereby the plaintiff was prohibited from using the defendant's name. He gave notice of motion accordingly to restrain the plaintiff till further order from so using his name, and when his motion was opened the preliminary objection was taken to it which has given rise to this appeal.

Now let us see what the relief sought by the defendant really is. Certainly the application is not one for relief which is incidental to that which is sought by the plaintiff in his action. The present case is not like *Sargant v. Read* (1), where the plaintiff's action was for dissolution of partnership and taking of the partnership accounts, and for a receiver, and Sir GEORGE JESSEL held that the defendant was entitled to move in the action for the appointment of a receiver. Nor is it like *Porter v. Lopes* (3), which was a partition action, and the Court appointed a receiver on the motion of the defendant. In the present case these cross-motions had nothing to do with one another, except that they were both based on covenants contained in the same deed, but Mr. Justice KEKEWICH considered the two covenants were so disconnected with one another that the defendant's claim did not arise in any matter which was before the Court. The defendant is not inclined to wait, and comes and says: "Grant me the relief I seek by an immediate injunction," and he relies on Order L. r. 6 (2), which at first sight does seem to be in his favour. It provides as follows: [His Lordship read the rule, and proceeded:] The defendant has appeared, and founds his application on this section. If he is right in his contention it

would be just as competent for the plaintiff to move for an injunction in respect of something which is outside his action as it is for the defendant to do the same. If the relief which the defendant seeks were incidental to what is sought in the plaintiff's suit he would be right ; but if not—and in my opinion it is not incidental—he is wrong. If in such a case as the present the defendant is in a hurry and cannot wait till a counterclaim can be delivered, he must proceed by way of issuing a writ in a cross-action. This experiment has been tried, and for the first time, and it has failed. The appeal must be dismissed.

LOPES, L.J.: This is an important question under Order L. r. 6(2). The question is, whether the defendant was entitled to move for an injunction without issuing a writ in a cross-action or delivering a counterclaim.

Under certain circumstances, as, for instance, where the relief which the defendant seeks in his motion arises in respect of the plaintiff's action, or is incidental to his cause of action, a defendant can move without the necessity of a cross-writ or a counterclaim. This was the case in *Sargant v. Read* (1) and *Porter v. Lopes* (3). But if the relief sought is something outside the plaintiff's action altogether, something in respect of which there is no issue, then he cannot. In such a case the proper course, as Lord Justice LINDLEY has indicated, is for the defendant to issue a writ in a cross-action, or to deliver a statement of defence and counterclaim when the proper time comes. It may be that he cannot at once put in a defence and counterclaim for lack of a statement of claim having been delivered ; if that is the case, his proper course is to issue a writ in a cross-action, and then the two actions might be consolidated. In the present instance the defendant is seeking to move for an injunction in the matter of something which is outside what is claimed by the plaintiff's action.

I think, therefore, that the appeal should be dismissed.

DAVEY, L.J.: It may or may not be a wise thing that the rules require a litigant to issue a writ stating in more or less general terms the nature of the relief he requires before he is entitled to move for an injunction. The rules do require it, but the appellant's

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counsel contends that the defendant is in a better position, inasmuch as a writ has been issued, and that he can move for an injunction without the necessity of converting himself into an *actor* suing by way of counterclaim or issuing a writ in a cross-action. Suppose a plaintiff issued a writ against a defendant for a breach of trust, could the defendant move for an injunction to restrain the plaintiff from publishing a libel against him—for instance, accusing him of cheating at cards? The appellant says he could, and he supports his proposition by referring to subsection 7 of section 24 of the Judicature Act, 1873 (4), and Order L. r. 6 of the Rules of the Supreme Court, 1883 (2), and he says that “an injunction,” referred to in subsection 7, means any injunction which the defendant considers himself entitled to. I cannot agree with that construction of the rule. I think it means an injunction relating to or arising out of relief sought in an action which is brought before the Court, and of which the Court has cognizance. The defendant’s cross-motion here does not fulfil that condition: the relief sought by him does not arise out of the relief which is sought in the only proceedings which are before the Court. The present case does not come within *Sargant v. Read* (1), which was cited, and which illustrates the point; there the relief sought by the defendant did arise directly out of what was before the Court, the object there being to preserve the *status quo* of the property, the subject of the action, until the trial. It is a strong point against the appellant’s contention that he has not been able to produce a single case which supports it. The Judicature Act has been for twenty years before the Courts, and there does not appear to be any case in which relief has been sought as it is here asked for by a defendant, but he has been left to obtain it by means of either issuing a writ in a cross-action or by putting in a counterclaim.

The appeal must therefore be dismissed.

Appeal dismissed.

Solicitors: *W. H. Hales*, for the Appellant.

O. Wheable, for *Scotney & Shenton*, Winchester, for the Respondent.

IN RE X. (A PERSON INCAPABLE OF MANAGING HIS AFFAIRS).

1894, May 28. LINDLEY, LOPES AND DAVEY, L.JJ.

Lunacy—Settlement—Tenant for Life incapable of Managing his Affairs—Person appointed to act on his Behalf—Jurisdiction to authorize Sale of Mansion-house—Lunacy Act, 1890 (53 Vict. c. 5), ss. 116, 120, 128.

Where a tenant for life under a settlement which contained a general power of sale of all or any of the settled hereditaments, has become through mental infirmity incapable of managing his affairs, and a person has been appointed to manage the property and to exercise the powers vested in the tenant for life by statute or under the settlement of granting leases, the Court has jurisdiction, under sections 120 and 128 of the Lunacy Act, 1890, to authorize the person so appointed to act on behalf of the tenant for life to exercise the power of sale in reference to the mansion-house.

By a settlement dated 10 August, 1858, certain real estates were resettled. The settlement contained a power for the then tenant for life during his life, with the consent in writing of the trustees therein named, or the survivor of them, his executors or administrators, and after the decease of the first tenant for life for his eldest son (who was under the settlement the next tenant for life), and for each tenant for life of the settled hereditaments when and as he should be in the actual possession of or entitled to the receipt of the rents and profits of the said hereditaments, with the like consent, and for the trustees during minorities to sell or exchange for other hereditaments all or any of the settled hereditaments by public auction or private contract as therein mentioned, and for the purpose of effectuating any such sale or exchange to revoke all or any of the uses, trusts, powers, and provisions of the settlement, and to appoint any uses, estates, or trusts which should be thought necessary or expedient to effectuate such sale or exchange, and the trustees were to receive the purchase-money. The first two tenants for life having died, X. in 1885 became tenant for life in possession under the settlement. In 1886, X. and his eldest son executed a resettlement of the estates, but such resettlement did not affect X.'s tenancy for life under the settlement of 1858.

Owing to a sudden failure of memory, X. became, "through mental infirmity arising from disease incapable of managing his affairs," within section 116, subsection 1 (d) of the Lunacy Act, 1890, and on

15 July, 1891, an order was made by Lord HALSBURY, L.C., under that section authorizing his eldest son to manage the settled estates, and to exercise on his behalf, among other powers, the powers vested in him by statute or under the settlement of granting such building, agricultural and mining leases of the settled hereditaments as the Master in Lunacy should approve.

The character of the neighbourhood of the settled estates had so changed in recent years that it had for some time past been the desire of the tenant for life to sell the mansion-house and park. This application was now made for an order authorizing the eldest son of X. to exercise on behalf of his father the power of sale contained in the settlement of 1858. A statement of facts had been prepared, in paragraph 5 of which it was alleged that the power of sale in the settlement of 1858 did not extend to the mansion-house, but that in the resettlement of 1886 special provisions were inserted extending such power of sale so as to allow the sale of the mansion-house or any sale under the Settled Land Act, 1882. On the hearing it appeared that the statement in paragraph 5 that the power of sale in the settlement of 1858 did not extend to the mansion-house was erroneous, and that it did in fact so extend.

Cozens-Hardy, Q.C., and *Ingle Joyce*, for the applicant:

Your Lordships have jurisdiction to make the order under the Lunacy Act, 1890, ss. 120 and 128. Under section 187 of the Lunacy Regulation Act, 1853, which is identical with section 128 of the Act of 1890, it has been held that the exercise of analogous powers might be authorized. In *In re Nevill* (1) the committee of a lunatic was authorized to consent to the exercise of a power of advancement contained in a marriage settlement. In *In re Blake* (2) the appointment of a new trustee was directed to be made by the committee, as was also done in *In re Bowmer* (3).

C. T. Mitchell, for the surviving trustee of the settlement:

I do not oppose the application, and am willing to consent to the sale, but would point out that in *In re Martha Baggs* (4) your

(1) 31 Ch. D. 161; 55 L. J. Ch. 435; 54 L. T. 290.

(2) W. N. 1887, p. 173.

(3) 28 L. J. Ch. 618; 7 W. R. 313.

(4) 38 S. J. 127.

Lordships considered this question, and decided that the Court had no power to authorize a sale of the principal mansion-house.

[DAVEY, L.J. : Our decision was that in consequence of the words of the Settled Land Act the power could not be exercised except where there was a lunatic so found by inquisition.

LINDLEY, L.J. : The point in *In re Martha Baggs* (4) was whether the Court could authorize a sale under the Settled Land Act, 1882, where the lunatic had not been so found by inquisition, and it was held that the Court could not do so. That case was decided exclusively on the Settled Land Act, and has nothing to do with the present case.]

In re Blake (2) would seem to be in point. I admit that the power of sale in the settlement is a general one, and applies to the mansion-house.

LINDLEY, L.J. : I think, now that we understand the facts, that there is no difficulty at all in seeing that the Court has jurisdiction to authorize the gentleman who is appointed to take care of the supposed lunatic to exercise this power of sale. The difficulty has arisen from a mistake in the statement of facts. We are not asked to run counter to *In re Martha Baggs* (4) or to run counter to the Settled Land Act. We are to apply sections 120 and 128 to the power conferred by the settlement authorizing the tenant for life here to concur in the sale *inter alia* of the mansion-house. The statement of facts must be amended by striking out paragraph 5.

LOPES, L.J. : Clearly we could not do this under the Settled Land Act. The power there given is confined to the case of a person who is a lunatic so found by inquisition. I am of opinion beyond all question that the combined effect of sections 120 and 128 of the Lunacy Act, 1890, together with the power contained in the settlement, enables that to be done which is desirable in this case.

DAVEY, L.J. : I agree.

Application allowed.

Solicitors : *Grover, Humphreys & Son.*

DRIELSMA v. MANIFOLD.

1894, June 7. LINDLEY LOPES, AND DAVEY, L.JJ.

Solicitor—Sale by Auction—Scale Fee, when Applicable—Auctioneer merely taking the Bids—“Auctioneers’ Charges” and “Commission”—General Order of 1882 under Solicitors’ Remuneration Act, 1881 (44 & 45 Vict. c. 44), s. 4, and Schedule I., Part I., Rule 11.

Where, in accordance with the usual practice in the North of England, a solicitor does all the work in connection with a sale by auction except taking the bids, and the auctioneer is paid a fixed sum for each lot sold, and a fixed sum for each lot unsold; such payments to the auctioneer constitute a “commission” within Part I., Rule 11, of Schedule I. of the General Order of 1882, and disentitle the solicitor to charge the scale fee allowed by that schedule “for conducting a sale of property by public auction.”

APPEAL from the Vice-Chancellor of the Palatine Court of Lancaster.

On 22 January, 1894, an order was made in the Palatine Court for payment (*inter alia*) of the plaintiffs’ costs, and it was referred to the Registrar to tax such costs. Items 16 and 17 of the bill delivered by the plaintiffs’ solicitors charged under Schedule I., Part I., of the General Order made in pursuance of the Solicitors’ Remuneration Act, 1881, scale fees amounting respectively to 10*l.* 10*s.* and 22*l.* 13*s.* 9*d.* for conducting the sale or attempted sale by auction of certain real estate directed by an order of the Court to be sold. The Registrar, by his certificate dated 18 April, 1894, disallowed both these items, substituting therefor charges in the nature of a *quantum meruit* under Schedule II. of the General Order.

Section 4 of the General Order provides that the remuneration for conducting sales by auction “prescribed by Schedule I. of this order is not to include stamps, counsels’ fees, auctioneers’ or valuers’ charges.” Rule 11 of the Schedule provides that the scale fee “shall apply only in cases where no commission is paid by the client to an auctioneer.”

It appeared that in Liverpool, and generally in the north of England, it is the practice for the solicitor to do all the work in connection with a sale, except that the auctioneer attends the sale and takes the bids, which no one but a licensed auctioneer is legally entitled to do. For this the auctioneer is paid a fixed sum of 2*l.* 2*s.*

for each lot sold, and 1*l.* 1*s.* for each lot unsold. That practice was followed in the present case.

For the plaintiffs it was contended that the sum so paid to the auctioneers was an "auctioneer's charge" within section 4, and not a "commission" within Rule 11, and that therefore the scale fee ought to be allowed. On 24 April, 1894, a motion on behalf of the plaintiffs to vary the Registrar's certificate on this ground was refused with costs, the Vice-Chancellor holding that he was bound by authority to decide that the scale fee did not apply. The plaintiffs appealed.

Cozens-Hardy, Q.C., and R. F. Norton, for the appellants :

"Charges" in section 4 and "commission" in Rule 11 mean different things. The authorities show that the employment of an auctioneer does not prevent the scale from applying: *In re Wilson* (1), *In re Merchant Taylors' Company* (2). By Rule 4 the scale fee, if it applies at all, is exclusive of auctioneers' charges. There is no reason why the solicitor should pay the auctioneers' charges, any more than counsel's fees. *In re Sykes, Sykes v. Sykes* (3), and *In re Peace and Ellis* (4) are against us. *Wood v. Calvert* (5) is distinguishable. Fairly read, *In re Macgowan, Macgowan v. Murray* (6), is not against us. Its bearing depends upon what is held to be the proper work of a solicitor. If there is anything unfavourable to our contention in the remarks of KAY, J., the Court of Appeal did not take the same view.

They also cited *Parker v. Blenkhorn* (7) and *Burd v. Burd* (8).]

T. R. Hughes, for the respondents :

No doubt there is a discrepancy between section 4 of the Order and Rule 11 of the Schedule. The sum of 2*l.* 2*s.* or 1*l.* 1*s.* paid to the auctioneer in this case is a "commission" none the less that it

(1) 29 Ch. D. 790; 55 L. J. Ch. 627; 53 L. T. 406.

(2) 30 Ch. D. 28, 37; 54 L. J. Ch. 867; 52 L. T. 775; 33 W. R. 693.

(3) 56 L. J. Ch. 238; 56 L. T. 425; 36 W. R. 234.

(4) 57 L. T. 753; 36 W. R. 61.

(5) 55 L. T. 53; 34 W. R. 732.

(6) [1891] 1 Ch. 105, 117; 60 L. J. Ch. 118; 63 L. T. 793; 39 W. R. 227.

(7) 14 App. Cas. 1; 58 L. J. Q. B. 209; 59 L. T. 906; 37 W. R. 401.

(8) 40 Ch. D. 628; 58 L. J. Ch. 170; 60 L. T. 228; 37 W. R. 428.

is a lump sum; just as a stockbroker's "commission" may be a fixed payment for each share sold. Section 4 is a general rule, relating to all the items in Schedule I.; Rule 11 is a particular rule governing sales by auction. Therefore, if the two are inconsistent, Rule 11 must prevail. The point of Rule 11 is not in the word "commission," but in the words "by the client"; the object being that the client may know beforehand how much he will have to pay in all. The real meaning is, "where nothing is paid by the client to an auctioneer." On any other construction an absurd result would follow. In the south, where the auctioneer usually does much of the work, the solicitor is entitled only to a *quantum meruit* for his services. The entire payments made to the auctioneer and the solicitor are in respect of work which if done by the solicitor alone would entitle him to the scale fee. But in the north, if the appellants are right, the client will have to pay, for exactly the same work, both the scale fee to the solicitor and a further sum to the auctioneer.

The cases cited by the other side are in my favour.

Cozens-Hardy, Q.C., in reply:

Ours is the only construction which makes the two rules consistent.

LINDLEY, L.J.: This case raises a question of some difficulty and importance. The point is this: Whether a solicitor who is conducting a sale by auction and who has paid an auctioneer, according to the custom which prevails in the north of England, a fee or a payment or a sum for taking the bids is entitled to be paid by the scale fee, or by what we call a *quantum meruit*. That he will get paid for his services is plain either way. But he wants to be paid by the scale fee; and the controversy is whether that is the right way. The difficulty arises from the wording of the Order made in pursuance of the Solicitors' Remuneration Act, 1881. Clause 4 runs thus: [The Lord Justice read the material part of section 4, and continued:] Therefore, it would appear that there may be a scale fee and also some auctioneer's charges which may be charged against the client. It is very difficult to read these words without coming to that conclusion. Now

we look at the remuneration provided by Schedule I. That schedule runs thus: "Vendor's solicitor for conducting a sale of property by public auction, including the conditions of sale;" and the scale fee is allowed. If we stop there, there is no difficulty in reconciling that with section 4. But then we come to Rule 11, which runs thus: [The Lord Justice read the rule, and continued:] That gives rise at once to the difficulty, what is the difference between the "commission" in Rule 11 and a "charge" under clause 4 of the Order? Well, I confess I cannot make out that there is any. An auctioneer employed by a solicitor to sell is certainly employed as an agent, and if you take the remuneration of an agent to be what is generally meant by the word "commission," everything you pay him for his services comes within it. I cannot see what the framers of this Order and of the scale under the rule were driving at if they really intended to draw a distinction. If they did not intend to draw a distinction, then the two words mean the same thing. And then you have a general enactment, and a specific regulation applying to a sale by auction. Well, if you are reduced to that, the specific must prevail over the general. That was the view adopted by this Court in *Wilson's Case* (1), and that has been the view which has prevailed ever since, and in accordance with that there is the decision in *In re Peace & Ellis* (4), which is a distinct decision on the very point submitted to us. I cannot help thinking that *Mr. Hughes's* observation is very weighty, that the real object of Rule 11 is not to draw a distinction between "charge" and "commission," but to draw a distinction between what is to fall on the client and what is not. I cannot help thinking that that is what they were driving at: if the client is to be charged with anything paid to an auctioneer the scale fee is not applicable, and the other method of remuneration is to be enforced. We are told by Master Ryland that that has been the view adopted ever since 1882 in the Taxing Office, and all over the country. I quite agree this is the first time it has been brought pointedly before the Court of Appeal. I agree there is a difficulty; but there is no decision that conflicts with what I have said. *In re Macgowan, Macgowan v. Murray* (6), is not at all opposed to it; because there the thing which was allowed for in addition to the scale fee was something which did not come

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within the expression "negotiating a sale of property," that is to say, the client was not paying more than the scale fee for negotiating the sale. That is quite consistent with what we are now saying. Here the fee payable to the auctioneer is clearly comprised in the remuneration for conducting a sale. I think we ought not to disturb the practice which has prevailed for so long. I think the view taken in the Court below and in the Taxing Office is the right one.

LOPES, L.J.: I am of the same opinion. It is extremely difficult to reconcile section 4 of the General Order with Rule 11 of Schedule I., Part I. The only way I can do it is the way which has been suggested by Lord Justice LINDLEY; that is, by holding that the word "commission," as used in Rule 11, has not any specific meaning, but is to be read as implying that the scale shall apply only where no other payment in respect of the conduct of a sale is made by the client. I am very much driven to that by *Mr. Hughes's* argument that, if we held otherwise, in effect the client would be paying twice for taking the bids, because the remuneration by the scale fee is intended to include all expenses of conducting the sale. I cannot think that result was intended.

DAVEY, L.J.: I am of the same opinion. If I could see my way to holding that "commission to an auctioneer" in Rule 11 means the commission which is usually paid, I believe, in London and the south of England to an auctioneer, and which comprises his remuneration not only for actually taking the bids but also for doing that work—as advertising, preparing posters, and things of that kind—which I believe is usually done in the south of England by the auctioneer; and to holding that a fee paid to the auctioneer for merely taking the bids, according to what we are told is the practice in Manchester and other parts of the north of England; I would do so. In other words, if I could construe this rule as meaning that where the auctioneer does part of the work which is the solicitor's work and included in the conduct of a sale by the solicitor, and that in that case where "commission" was paid the scale fee was not to apply, for the reason that the work for which

the scale fee is given had not been done, and that it would apply where nothing more than the fee for taking the bids was paid ; I think that would be a reasonable rule, and very likely might express the intention of those who framed this Order. But on consideration I cannot see my way to hold that. "Commission" is *primâ facie* a payment made to an agent for agency work, usually but not necessarily according to an *ad valorem* scale. It is, in my opinion, the most general word for remuneration paid to an agent other than a salary, and I do not see how we can restrict the "commission" in Rule 11 so as not to include the fee paid to an auctioneer for taking the biddings at a fixed agreed rate of so much per lot. I think nobody could properly say that the auctioneer was not an agent, or that the sum per lot—2*l.* 2*s.* if the lot was sold, 1*l.* 1*s.* if unsold—was not a commission. That being so, I am of opinion that the fees which were paid in the present case to the auctioneer were a commission, and have been charged to the client in addition to the scale fee or the remuneration claimed by the solicitor. It appears to me that Rule 11 applies, and that the solicitor is not entitled to the scale fee, although he will be entitled to charge a *quantum meruit* for his services. In coming to this conclusion I have been much struck by some observations addressed to us by *Mr. Hughes*. If, he said, the argument put forward on behalf of the appellants as to the meaning of the Order is correct, then in the south of England, where the auctioneer's commission comprises payment for other things than merely taking the bids, the client will pay only the scale fee, or if he pays the auctioneer's commission the solicitor will get only a *quantum meruit* for what he does ; but in the north of England the solicitor will have his full scale fee, and the client will also have to pay the auctioneer for taking the bids. This rule was prepared by skilled persons, who were no doubt well acquainted with the practice as well in Liverpool and the north as in the south, and the substance of the matter appears to me to be that the scale is intended to include all the expenses of conducting a sale, including the auctioneer's remuneration, understanding by remuneration what is paid to the auctioneer whether for merely taking the bids or for any other thing. It is said that this is inconsistent with section 4 of the Order. There is a certain inconsistency, and I do not attempt to explain it ; but this

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I do say, that, according to the ordinary rule of construction, where there is a specific rule applicable to the particular case, then you must apply the specific rule, notwithstanding that there is a general rule to which the specific rule seems to be contrary. If you cannot reconcile the two, then you must apply the special specific rule. For myself, I think it is quite possible that section 4 of the Order was drawn in its present form before the scale and the rule applicable to it were settled, and that by an oversight these auctioneers' charges were omitted. But section 4 is applicable to every kind of transaction dealt with in the scale, and it is possible that there may be a case in which auctioneers' charges for selling by auction might be charged in a mortgage transaction or some other transaction of that kind. At any rate, section 4 is applicable to all kinds of transactions dealt with in the schedule, whereas Rule 11 is a specific provision which, according to the construction I have put upon it, is strictly applicable to the present case. I do not think we ought to refuse to apply Rule 11 to a case to which it is directly applicable merely because there is some difficulty in reconciling it with section 4 of the General Order.

Appeal dismissed.

Solicitors for all Parties: *Burton, Yeates & Hart*, for *Tyrer, Kenion, Tyrer & Simpson*, Liverpool.

HANFSTAENGL v. EMPIRE PALACE (No. 1).

1894, February 21. LINDLEY, KAY AND A. L. SMITH, L.JJ.

Copyright—Painting—Tableaux Vivants—Infringement—Copyright (Works of Art) Act, 1862 (25 & 26 Vict. c. 68), s. 1.

To constitute an infringement of the copyright of a painting under section 1 of the Copyright Act, 1862, the reproduction must be something which is itself in the nature of a picture, and accordingly a *tableau vivant* after a painting, so far as it consists of a merely temporary arrangement of living figures, is not a reproduction of the painting or the design thereof within the prohibition of the section.

APPEAL from Stirling, J.

The plaintiff was an art publisher at Munich, and was the proprietor of the copyright of five paintings by foreign artists.

The defendants were exhibiting at their theatre in London *tableaux vivants* after these pictures. The programme relating to such exhibition made reference to the paintings, and it was in evidence that the *tableaux* were practically exact representations of them, the details being reproduced in a very exact manner by means of painted canvas backgrounds and accessories, the figures in the foreground being living persons who were attired, made up, and posed so as to represent as nearly as possible the figures in the pictures in their original attitudes and draperies; the effect was further enhanced by the various *tableaux* being represented inside a large gold frame set up in the centre of the stage, and the auditorium being left in entire darkness, and a strong limelight being thrown upon the *tableaux* as they were successively introduced. It was not denied in substance that the basis of the *tableaux* was in point of fact the pictures, but it was deposed that the representations were not from the original paintings but from photographs of them; that there was a separate and distinct proscenium erected on the stage and various movable properties, such as flower-stands, were used, and that the arrangements of colour and light and shade were the defendants' own arrangement and not derived from the pictures.

The plaintiff commenced this action on 12 February, 1894, to restrain the defendants, their servants, agents, artists, and workmen,

from exhibiting or representing any copies or imitations of the pictures.

Upon motion for an interim injunction, STIRLING, J., refused the plaintiff's application, on the defendants undertaking, till the trial or further order, to keep the painted backgrounds or take and keep photographs of them, and to keep an account of all moneys received for admission to entertainments at which such backgrounds were exhibited.

The plaintiff appealed.

Graham Hastings, Q.C., Sir R. E. Webster, Q.C., and T. E. Scrutton, for the appellant :

This is an infringement of the copyright under the Copyright (Works of Fine Art) Act, 1862. These *tableaux* are "reproductions" of the paintings or the design thereof within the prohibition of section 1. They are as much copies as the descriptions of the pictures in the case of *Ex parte Beal* (1) were sufficient "descriptions" within the meaning of section 4.

[LINDLEY, L.J., called attention to the fact that the various Copyright Acts did not all use the same expression; the Fine Arts Copyright Act, 1862, used the word "reproduce," which was a very different thing from the word "represent," used in the Dramatic Copyright Act.]

The word "exhibition" is used in the Act of 1862, which comes to the same thing as the word "representation." The Act was intended to give the fullest possible protection as to copyright, and is not to be construed narrowly.

Dicks v. Brooks (2) was mistakenly relied on by Mr. Justice STIRLING because there the person complaining was not the author of and had no copyright or property in the design, and the object of the statute applicable in that case, the Engraving Copyright Act, was to protect the author of the design; the thing complained of there would have been an infringement as against the original artist, though it was not as against the person complaining.

(1) L. R. 3 Q. B. 387, 393; 37 L. J. Q. B. 161; 18 L. T. 285; 16 W. R. 532; 9 B. & S. 395.

(2) 15 Ch. D. 22, 34; 49 L. J. Ch. 812; 43 L. T. 71; 29 W. R. 87.

Mr. Justice STIRLING was wrong in holding that, as that case says that the reproduction there must be of the nature of an engraving, so here it must be of the nature of a painting. "Copy" is defined in *West v. Francis* (3) as something "which comes so near to the original as to give to a person seeing it the idea of the original."

[KAY, L.J.: That does not touch the point we want cleared up, which is, whether the Act does not mean that the thing produced when complete must be something in the nature of a picture.

A. L. SMITH, L.J.: If, as you contend, these *tableaux* are pictures, must there not be a copyright in them? If the painter himself had produced them, would he have had a copyright in them? Must not a picture be a thing in which there is a copyright?]

A reproduction of a *tableau* would be a reproduction of the original picture, and so the painter could protect it: we can hardly contend these *tableaux* are pictures to the extent suggested by the question.

[They also referred to a passage in *Lucas v. Cooke* (4), and to *Gambart v. Ball* (5), which came before the Court in *Graves v. Ashford* (6).]

[KAY, L.J.: I do not suppose anyone could make a Roman mosaic copy of these pictures without infringing the copyright in the design.]

Buckley, Q.C., and *Roger Wallace*, for the respondents, were not called upon to argue.

LINDLEY, L.J.: This is an important question and a new one, but I cannot help thinking that we are asked to put upon the Copyright Act of 1862 a construction which was never dreamed of when it was passed, and which it does not really bear. We are asked to say that a person who is an author of a painting, or a drawing, or a photograph, is entitled to restrain other people from representing it by living pictures. Whether it is called dramatizing or not, or whether there is action or not, I do not think material.

(3) 5 B. & Ald. 737, 743; 1 D. & R. 400.

(4) 13 Ch. D. 872, 879; 42 L. T. 180, 183; 28 W. R. 439, 441.

(5) 14 C. B. (N. S.) 306; 32 L. J. C. P. 166; 8 L. T. 426; 11 W. R. 699.

(6) L. R. 2 C. P. 410; 36 L. J. C. P. 139; 16 L. T. 98; 15 W. R. 495.

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Consider what this Act is on which the plaintiff bases his right. It is immaterial that he is a foreigner ; he may be treated under the International Copyright Act for this purpose as if he were the author (and a British subject) of some original painting, drawing, or photograph : the process by which he attains that position need not be gone into, it is conceded that that is his position. The Act of 1862 is one of a series : there is a Literary Copyright Act, an Engraving Copyright Act, a Painting Copyright Act, a Designs Copyright Act, a Dramatic Copyright Act, and I rather think a Sculpture Copyright Act. This Act was passed in order to place painters and people of that class in a position more or less similar to the position of engravers, who were protected by previous Acts of Parliament. If my memory serves me right, there was, as early as the reign of George II., an Act protecting engravers and giving them a copyright in their engravings, that being followed by another Act in George III.'s time, where, again, painters were left out, and painters naturally complained that there was no Act for them. The Act of 1862 was brought in to assist them and give them a commercial copyright in their paintings. It was not confined to painting, but extended to drawings and photographs, but the object was to deal with persons of that class, and protect them from persons who would copy their drawings, or paintings, or photographs, in the ordinary way in which such things were made, or in any new way which might be invented. But Parliament was not, in endeavouring to protect them, laying a totally different class of persons under restraint ; it was not dealing with or intending to limit the scope of a sculptor's or an actor's business, or anything of the sort ; it was intended to protect painters and persons who produced drawings and photographs from having their drawings infringed, and infringed by the reproduction by any means of a thing similar to that which they produced and of which they were the authors. That is the key of this Act and of the series of which it is part.

The language of section 1, shortly, is this : "The author of every original painting, drawing, and photograph shall have the sole and exclusive right of copying, engraving, reproducing and multiplying such painting or drawing and the design thereof, or such photograph and the negative thereof, by any

means and of any size for the term of his natural life," and so on. What does that mean? We are asked to say that by the words "copying and reproducing by any means" is meant reproducing in the sense of imitating or representing by means not equivalent to drawing, or painting, or photographing, or any such means at all, but by totally different means—by the exhibition of living figures. Is that what is aimed at? It appears to me obviously and plainly it is not. It is nothing of the kind. When we look at the language used where that sort of idea was present to the mind of the Legislature, we find a totally different class of words used; then the word "represent" is the word used: there is not a word about "represent" here. It is not meant that the author of a picture shall prevent somebody from representing his picture by any means whatever, but it is intended to protect the author of the picture from somebody who may produce another picture and compete with him in the market. That is the object of the Act, and the language appears to me to be incapable of being fairly stretched so as to touch such representations as are sought to be interfered with and restrained in this case.

Light is thrown upon the true construction of section 1 by sections 6 and 10, which are about forfeiting and preventing the importation of goods. Those sections would not be applicable to this Act of Parliament if it were construed as the plaintiff asks us to construe it. But I do not rely so much upon those sections as upon the clear, and what I consider the unquestionable, meaning and intention of Parliament in passing this series of Acts. If we are to go out of the language and look further, I think a good deal of light is thrown upon this question by the case of *Dicks v. Brooks* (2), because, although it is very true that the word "design" is not used in the Engraving Act, and *Mr. Scrutton's* criticism is just, still the object of that Act in protecting engravings is exactly the same as the object which the Legislature had in view in protecting paintings, drawings, and photographs in this Act. It was not meant to give plaintiffs the right to restrain such persons as Madame Tussaud or anybody from exhibiting in waxworks; such works do not infringe the rights of the author of the painting, they do not interfere with something that is produced, in the market.

I think the present experiment must fail, with costs.

KAY, L.J.: I am entirely of the same opinion. The plaintiff in this case, I understand, has all the rights of the author of the paintings which he says have been reproduced, and, therefore, he has the right to protect the painting and the design thereof. As Lord Justice LINDLEY has said, he is brought within this statute which we have to consider; for, although he is a foreigner and the paintings are foreign paintings, yet, by reason of the International Copyright Act, he may be treated as though he were a British subject and the author of a painting produced in this country by a British subject.

What has actually been done is, as I understand, that upon the stage of the defendants' theatre a large gilt frame has been set up, and within that frame a certain amount of canvas has been painted as a background with which at present we have nothing to do, because the undertaking given as to that, I think, covers that part of the case, and the argument before us has not been at all rested upon the fact that certain portions of this so-called picture have consisted of a painted canvas that has been used as a background. I put that aside. The rest of the so-called picture consists of human figures, grouped precisely and dressed, I presume, precisely like the figures in the pictures of which the plaintiff is the owner; and the design of the pictures, that is, the grouping of the figures and their arrangement in the *tableaux*, and the accessories around them, are all taken, I assume, directly from the pictures which it is intended to represent. The question is, whether that kind of thing (putting the background out of sight for the moment), a representation of a picture of which the plaintiff is in the position of the author or artist, is a reproduction of the painting or of the design within the meaning of this Act. If it is, of course the right to an injunction is quite clear.

Now is this which I have been shortly describing a reproduction of such painting? A reproduction of a painting must be, one would think, by another painting, or something which is equivalent to another painting; and I do not think it has been argued on that ground that this is really a reproduction of the painting. But is it a reproduction of the design of a painting? The argument has been rather put, on the latter part of the clause, that this is a reproduction of the design of a painting within the

meaning of this Act. What does "reproduction" really mean? "Reproduction" is producing again. Is this producing again the design of this painting within the meaning of the Copyright Act? I cannot think it is. It seems to me that in order to reproduce the painting you must have something which is, and would be properly described as, a picture itself, and I avail myself of the suggestion made by Lord Justice SMITH during the argument. He asked (and the question seemed to me to test it very closely indeed): "Supposing the author of these pictures had himself had these *tableaux vivants* represented upon the stage of some theatre, could he have had a copyright in the *tableaux vivants*?" Would the *tableaux vivants* have been a picture within the sense of this Act of Parliament, and does not a picture mean something in which, if the original author of the painting had himself produced it, he might have had copyright of that? I think that is the meaning of this Act of Parliament. I should come to that conclusion if I rested simply upon the language of section 1. But then, when you look further into the Act of Parliament, I think that view is quite confirmed by the language of the subsequent sections. Take section 6. Section 6 seems to cover the very same kind of offence and to impose a pecuniary penalty for the repetition of any such act. The words are a little different there. They are: "If any one shall, without the consent of the proprietor, repeat, copy, colourably imitate, or otherwise multiply, for sale, hire, exhibition, or distribution," and so on, he shall forfeit a sum not exceeding 10*l.*; "and all such repetitions, copies, and imitations made without such consent as aforesaid, and all negatives of photographs made for the purpose of obtaining such copies, shall be forfeited to the proprietor of the copyright."

Therefore the Act contemplates, I think, such a reproduction as results in a picture which can be forfeited under section 6. Of course, to apply this particular case, you see at once here there is no reproduction of a picture that could be forfeited; the living persons who represent themselves in the *tableaux*, no doubt taken from the design of the original picture, cannot be forfeited. This is a case which does not seem to me to come within the meaning of this statute at all. If it did, it would follow of course that anybody in his own private drawing-room who arranges a

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tableau vivant of his friends or guests in the manner and for the purpose of imitating a group of figures in a well-known picture would be infringing the Copyright Acts, because the element of doing it for reward or remuneration does not enter into the Act at all. Any kind of copying, whether for profit or not, comes equally within the mischief against which this Act of Parliament was enacted.

For my part, I come to the conclusion that what has been done (leaving the background out of the question) is not an infringement of anything within this Act of Parliament, that it is not a reproduction of the paintings which are here in question, and therefore that this appeal entirely fails and must be dismissed with costs.

A. L. SMITH, L.J.: The question in this case depends entirely upon the construction of the Act relating to copyright in works of fine art, and is a very small point, though I admit it is of importance.

Now in the preamble to that Act it is recited, "Whereas by law as now established the authors of paintings, drawings, and photographs have no copyright in such works," and then it goes on: "Be it enacted." Now, what is enacted? It is enacted that the author of every original painting, drawing, and photograph shall have the sole and exclusive right of "copying, engraving, reproducing and multiplying" such painting or drawing and photograph and the design thereof "by any means and of any size," and the question is, what is the meaning of that section? It is provided by this Act that if that right of the author of any painting, drawing, or photograph be infringed he has three remedies; he may come for an injunction, he may also claim for penalties under section 6, and he may claim for damages under section 11. When I have to construe an Act of Parliament it always seems to me important that you should look at the whole Act, and not at the one section which you have to construe.

Now, looking at the whole Act, inasmuch as the author, as I have said, of every drawing, painting and photograph, if his right is infringed, may apply for any one of these remedies, I look to

see what the Legislature has said, if he applies for remedies either by way of penalty or by way of damages, shall happen. It is patent and as clear as anything can be upon an Act of Parliament, that section 6 (which deals with penalties) and section 11 (which deals with damages) do not include a case which we are now asked to bring within section 1—for the very simple reason that if the plaintiff applied for penalties under section 6 it is provided that the piratical imitations are to be forfeited—which, of course, applies only to things in the nature and character of paintings, pictures, or photographs, and things of that sort, and not to living beings, because they cannot be forfeited; and, if he applied for damages under section 11, it is equally patent that the present case is not aimed at by section 11, because, in addition to damages, he is entitled to enforce the delivery to him of all unlawful repetitions, copies, and imitations and negatives of photographs. It is perfectly clear what the Legislature had in its mind, viz. that the piratical acts would take the form of things which could be given up to be forfeited when they were complained of and when penalties were obtained or damages were recovered.

Now I look at section 1 in the light of the sections 6 and 11. What does section 1 enact? It enacts that the author of every painting, &c. shall have the sole and exclusive right of “copying, engraving, reproducing, and multiplying” such painting, drawing, photograph “and the design thereof.” “Copying.” How do you copy a painting? “Engraving.” How do you engrave a painting? “Reproducing.” How do you reproduce a painting? “Multiplying.” How do you multiply a painting? I am not reading here the other words “drawing, photograph or design,” because one is sufficient. I ask myself, stopping here, how do you do any one of these things—copy, engrave, reproduce, or multiply? How do you copy, engrave, reproduce, or multiply a painting or picture? Why, of course, by something in the nature or character of a painting, picture, drawing, or engraving. But then it is said that I am not reading the whole of that section because I have left out the words “by any means and of any size,” and that those words cover *tableaux vivants*, or the grouping of living pictures,—that because the picture has been copied it is reproduced, and has been multiplied by some other means and of some other size.

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That is not, to my mind, the meaning of the Act at all; to say it was, would be straining it out of all proportion. I am clearly of opinion that when this Act was passed nobody ever dreamt of trying to include a case like this in it. When you look at the statute, you see it was not drafted for that purpose, and, putting (according to the terms of Sir GEORGE JESSEL) a fair and honest meaning on this Act, I am clearly of opinion that the present application fails.

Appeal dismissed.

Solicitors: *Herbert Bentwitch*, for the Appellant.

Ashurst, Morris, Crisp & Co., for the Respondents.



HANFSTAENGL v. EMPIRE PALACE (No. 2).

1894, May 30, 31; June 11. LINDLEY, LOPES AND DAVEY, L.JJ.

Copyright—Infringement—Painting—Tableau Vivant—Rough Sketch in Newspaper—Fine Arts Copyright Act, 1862 (25 & 26 Vict. c. 68), ss. 1, 2—International Copyright Act, 1886 (49 & 50 Vict. c. 33), s. 2, subs. 3—Berne Convention—Order in Council, 28 November, 1887.

A sketch in a daily illustrated newspaper of a *tableau vivant* representing a picture may, though the *tableau* does not, constitute an infringement of the copyright of the picture, within the meaning of section 1 of the Fine Arts Copyright Act, 1862; but whether it does or does not is a question of fact and depends upon whether or not the sketch can fairly and reasonably, and as it would be judged by a jury, be considered a copy or reproduction of the picture or of the design thereof.

APPEAL from Stirling, J.

The plaintiff was a foreign publisher who claimed to be entitled under the International Copyright Acts to the copyright of certain pictures originally produced in Germany. These pictures had, with the plaintiff's sanction, been photographed and otherwise reproduced. The photographs had been made use of by the Empire Theatre for the production of what were called "Living Pictures," and it had been decided by the Court of Appeal (1) that such "living pictures" or *tableaux vivants* were not infringements of the plaintiff's copyright.

Artists instructed by the managers of the "Daily Graphic," an illustrated daily newspaper, visited the theatre and made sketches of the living representations of the plaintiff's pictures, and from these sketches were made rough drawings of which reproductions by mechanical means appeared, without the plaintiff's consent, in the "Daily Graphic" of 8 February, 1894.

The plaintiff, complaining that the reproductions in the newspaper were infringements of his copyright, moved for an interlocutory injunction to restrain the proprietors of the "Daily Graphic" from producing in their paper or selling copies, reproductions or colourable imitations of the pictures the subject of his copyright. On 6 April, 1894, STIRLING, J., holding that the productions in the

(1) 7 R. 375; [1894] 2 Ch. 1; 63 L. J. Ch. 417; 70 L. T. 459; 42 W. R. 454.

"Daily Graphic" constituted an infringement of the plaintiff's copyright, granted an injunction accordingly.

The proprietors of the "Daily Graphic" appealed. (The appeal was, by agreement, treated as an appeal from the trial of the action.)

Crackanthorpe, Q.C., Grosvenor Woods, Q.C., and H. A. Forman, for the appellants:

Firstly, the plaintiff is not registered in this country as the proprietor of the copyright in the pictures in question, and, therefore, he cannot maintain the action: *Fishburn v. Hollingshead* (2), *Hanfstaengl Art Publishing Co. v. Holloway* (3).

Secondly, assuming him to be entitled to the copyright in the pictures, the extent of that right must be determined by the German law and not by the English law: International Copyright Act, 1886, s. 2, subs. 8; Berne Convention, Art. 2; Order in Council, 28 November, 1887. His right according to German law is less extensive than it would be by English law. The sketches in the newspaper are subsidiary to the letterpress, and the German law does not consider such cases to be infringements.

Thirdly, even if measured by English law, what the appellants have done is not an infringement of the plaintiff's copyright. The sketches are merely rough drawings, in no way copies of the pictures in any real sense, though, to the mind of any person actually knowing the pictures, they would of course recall the idea of the originals: *Dicks v. Brooks* (4). To constitute an infringement there must be a substantial abstraction of the plaintiff's work, which there has not been here: *Chatterton v. Cave* (5); and the thing produced must be something which serves the same purpose as the original so as to deprive the plaintiff of some profit. The sketches were made from reproductions which were not infringements of the copyright of the pictures, and, therefore, are not themselves infringements, though sometimes the medium of reproducing is immaterial and does not protect a defendant, as in

(2) [1891] 2 Ch. 371; 60 L. J. Ch. 768; 64 L. T. 647.

(3) 5 R. 358; [1893] 2 Q. B. 1; 62 L. J. Q. B. 347; 68 L. T. 676.

(4) 15 Ch. D. 22; 49 L. J. Ch. 812; 43 L. T. 71; 29 W. R. 87.

(5) 3 App. Cas. 483, 498; 47 L. J. C. P. 545, 552; 38 L. T. 397, 400; 26 W. R. 498, 500.

Ex parte Beal (6), and *Turner v. Robinson* (7), where the copying was fraudulent.

(*Bradbury v. Hotten* (8), *Smith v. Chatto* (9), *Gambart v. Ball* (10), and *Scott v. Stanford* (11), were also referred to.)

The Court intimated that they would reserve, for further consideration if necessary, the first point—as to the necessity of registration.]

Graham Hastings, Q.C., Scrutton and A. H. Jessel, for the plaintiff:

Assuming the case to be governed by English law, the appellants have infringed the plaintiff's copyright: *West v. Francis* (12). The question of actual competition to the injury of the plaintiff is not material: *Hanfstaengl Art Publishing Co. v. Holloway* (3), *London Stereoscopic Co. v. Kelly* (13). The exclusive right of reproducing "by any means" conferred by section 1 of the Act 25 & 26 Vict. c. 68, must be intended to give protection against copying whether by direct or indirect means; the medium of copying is immaterial: *Ex parte Beal* (6), *Graves' case* (14), *Tinsley v. Lacy* (15), *Murray v. Bogue* (16), *Turner v. Robinson* (7). If the pictures themselves have not been imitated, at any rate the design of them has.

But it is said the case is different if governed by German law; that that law is applicable, and that under it the appellants have committed no infringement. But the answer is that, even under German law, the plaintiff's copyright has been infringed. The sketches are not subsidiary to the text, as the appellants contend, but rather the text is subsidiary to the sketches. If the pictures

(6) L. R. 3 Q. B. 387; 9 B. & S. 395; 37 L. J. Q. B. 161; 18 L. T. 285; 16 W. R. 852.

(7) 10 Ir. Ch. Rep. 121.

(8) L. R. 8 Ex. 1; 42 L. J. Ex. 28; 27 L. T. 450; 21 W. R. 126.

(9) 31 L. T. 775; 23 W. R. 290.

(10) 14 C. B. N. S. 306; 32 L. J. C. P. 166; 8 L. T. 426; 11 W. R. 699.

(11) L. R. 3 Eq. 718; 36 L. J. Ch. 729; 16 L. T. 51; 15 W. R. 757.

(12) 5 B. & Ald. 737; 1 D. & R. 400.

(13) 5 Times L. R. 169.

(14) L. R. 4 Q. B. 715; 39 L. J. Q. B. 31; 20 L. T. 877; 17 W. R. 1018.

(15) 1 H. & M. 747; 32 L. J. Ch. 535; 11 W. R. 876.

(16) 1 Drew. 353; 22 L. J. Ch. 457.

themselves have not been imitated, at least the idea conveyed by them has.

The object of the Berne Convention was only to cut down the rights of a native author if the term for which those rights would be enjoyed would be greater by English law than according to the law of his own country: consequently the words "greater right" in section 2, subsection 3 of the International Copyright Act, 1886, must be taken either (i.) as synonymous with "longer term" or (ii.) as dealing with the nature of the right and not the remedies relating to it.

Crackanthorpe, Q.C., in reply :

To constitute an infringement, there must be something produced which gives the idea of the original, something which can be a substitute for the original.

Bramwell Davis held a watching brief for the proprietors of the "Westminster Budget," an illustrated paper.

Cur. adv. vult.

June 11.

LINDLEY, L.J.: The first point of the appellant's argument—viz. the necessity for registration—has been reserved for further argument, for it is known to be difficult; there are conflicting decisions upon it; and, as it will not arise if we decide that there has been no infringement, we thought it better to decide the question of infringement first. This, after all, is the great question between the parties, because, although this action would fail if registration were necessary, still, the plaintiff could register his title, and then institute another action, and in that action raise the question of infringement, which both parties desire to have determined. I shall assume, therefore, for the present that registration is unnecessary, and that the plaintiff is entitled to copyright in this country under the International Copyright Acts, 1844 to 1886.

The first question which then arises is, What is the right conferred by those Acts on the plaintiff? And the second question is, Have the defendants infringed that right? I will address myself to each of these questions in turn. The right conferred by the

International Copyright Acts upon the plaintiff depends upon those Acts, and the Order in Council of 28 November, 1887, made under their provisions, and the Berne Convention of 9 September, 1886, referred to in that Order in Council. These documents are to be found in a convenient form in Mr. Copinger's and Mr. Scrutton's works on Copyright. The short effect of these enactments, Order in Council, and Convention is that, subject to the limitation imposed by section 2, subsection 3, of the International Copyright Act, 1886, the plaintiff is entitled to the rights conferred on British subjects by the Act 25 & 26 Vict. c. 68, which is the Act relating to copyright in paintings, drawings, and photographs. The right conferred by this Act is defined by sections 1 and 2. The short effect of these two sections, so far as paintings are concerned, is to give to the author of every original painting the sole and exclusive right of copying or reproducing the same, and the design thereof, by any means, and of any size, for the period mentioned in the Act. But anything in which there is no copyright may be copied, although somebody else may have copied it before, and may have a copyright in his own copy. (See per Lord, then Mr. Justice, BLACKBURN, in *Graves's case* (14).) The limitation of this right, when claimed by foreigners under the International Copyright Acts, is expressed in section 2, subsection 3 of the Act of 1886. If, therefore, the German law of copyright confers upon the plaintiff a less extensive right in his pictures than the right conferred on British authors by the Act to which I have already alluded, the extent of the plaintiff's rights must be measured by the German standard, and not by the English standard, and must be restricted accordingly. Now, in one respect the German law of copyright is shown by the evidence before us to be less extensive than the English, for by German law copyright in a painting does not extend to reproductions in literary works, provided that such reproductions are explanatory only of some text. It cannot be said as a matter of law that English copyright does not extend to such a reproduction, although whether any particular illustration of a text would amount to an infringement of copyright in a particular painting would depend upon circumstances, as will appear presently. Again, there is evidence to show that the German law confers no copyright in the design of a picture, as distinguished

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from the picture; but, on the other hand, there is evidence to show that, even by German law, copyright in a picture extends to the idea conveyed by it. I confess that I do not feel sufficiently sure of the German law on this subject to be able to base my decision upon it; nor is it necessary for me to do so, as will appear presently.

Having now ascertained the rights of the plaintiff, I proceed to consider whether they have been infringed by the proprietors of the "Daily Graphic." In order to determine this question it is necessary to know exactly what they have done. They (and by "they" I include their artist) have not seen or copied the plaintiff's pictures, or any painting, engraving, drawing, or photograph of them. What the defendants have done is this. They have sent two persons to the Empire Theatre to describe and sketch what was being represented there. What was seen there was an arrangement of living persons, so dressed and placed as to represent what was represented in the plaintiff's pictures. The idea of the representation at the Empire Theatre was no doubt suggested by and taken from the plaintiff's pictures, and the representation was made as exact as could be with such materials as were procurable. But the representations at the Empire Theatre were not infringements of the plaintiff's copyright in his paintings. This has been already decided (2). The sketches published in the "Daily Graphic" are rough sketches of those representations, but the sketches are so rough and incomplete that they do not represent any of the artistic merits of the plaintiff's pictures. The sketches merely convey a rough idea of the subjects of the pictures, and of the grouping of their main features. To this extent, but not further or otherwise, it is possible to regard the sketches as copies of the plaintiff's pictures, or as reproductions of the designs thereof.

Such being the facts, the question arises whether the publication of the sketches thus made is an infringement of the plaintiff's copyright. The learned Judge has held it to be so, but I am unable to agree with him. I will pass over the difference between English and German law, to which I have alluded, with the remark that I am not satisfied that the sketches in the "Daily Graphic"

are merely illustrations of the text. Their value to the reader does not depend on the text; and, if they were, without the text, infringements of the plaintiff's copyright, their connection with the text is not close enough to render the German law, as distinguished from the English, applicable to the case. The "Daily Graphic" is an illustrated paper, and the sketches complained of are intended to let people know what is to be seen at the Empire Theatre, and they have a value and importance wholly irrespective of the text which they are said to illustrate. They are principal objects, and not merely auxiliary or subordinate to the text by which it is sought to justify their insertion. Treating the matter as turning on the English law of copyright, conferred by the Act 25 & 26 Vict. c. 68, I am unable to hold these sketches infringements of the plaintiff's rights. The mere fact that the defendants did not know that they were copying the plaintiff's pictures would be immaterial if the sketches ought on other grounds to be regarded as infringements of the plaintiff's rights. (See *West v. Francis* (12).) Moreover, the defendants did, in my opinion, know that the scenes they sketched represented pictures in which some one might have a copyright. I do not decide the case, therefore, on the absence of any intention to copy the plaintiff's pictures, although the fact that the defendants never intended to copy them cannot be wholly disregarded in such a case as the present. Nor do I base my decision on section 2 of the statute 25 & 26 Vict. c. 68. The first portion of this section is not applicable, because the "work" there referred to is, I think, explained by the preamble to mean painting, drawing, or photograph, and, if the sketches complained of are copies of the plaintiff's paintings, they are copies of paintings in which he has a copyright. Neither is the second part of section 2 applicable to the case, because, although those sketches are sketches of a scene or object, the scene or object is not such as is referred to in the section. The scene or object referred to in the section is something which some one else has copied, and not a scene or object which is itself a copy from a painting in which there is a copyright.

Although, therefore, these sketches are made from something in which there is no copyright, and although they represent something which is not itself an infringement of the plaintiff's copyright, yet I am not prepared to say, as a matter of law, that these

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sketches might not infringe the plaintiff's rights, if they could be fairly regarded as reproductions of his pictures, or of the designs thereof. To hold otherwise would be to open the door to indirect piracies, which I am not at all disposed to do. A copy of a foreign copy of an English painting would not, I apprehend, be protected by section 2 (see *Murray v. Bogue* (16)), and the judgment of Lord BLACKBURN in *Ex parte Beal* (6) shows that if a painting is in fact reproduced it is immaterial what the intermediate steps may be by which the reproduction is arrived at. Again, the case of *Robinson v. Turner* (7), where the painting of the death of Chatterton was pirated by copying an arrangement made up from the picture, shows what injustice might be done if it were to be held that section 2 protected the defendants, if they could otherwise be held to have infringed the plaintiff's rights. My decision is based on different and on wider grounds. Copyright, like patent right, is a monopoly restraining the public from doing that which, apart from the monopoly, it would be perfectly lawful for them to do. The monopoly is itself right and just, and is granted for the purpose of preventing persons from unfairly availing themselves of the work of others, whether that work be scientific, literary, or artistic. The protection of authors, whether of inventions, works of art, or of literary compositions, is the object to be attained by all patent and copyright laws. The Acts are to be construed with reference to this purpose. On the other hand, care must always be taken not to allow them to be made instruments of oppression and extortion. It is on such considerations as these that fair reviews of literary works, although containing lengthy extracts from them, are not infringements of the copyrights in them; that a representation of part of a dramatic piece, if confined to some comparatively insignificant part of it, is not an infringement of the copyright in such piece. It was by considering the object of the statute, and not only its words, that in *Dicks v. Brooks* (4) a worsted-work copy of an engraving was held not to be an infringement of the copyright therein. Lastly, in this very action, this Court, proceeding on the same principle, quite recently decided that the representations in the Empire Theatre, by human beings arranged as shown in a picture, were not an infringement of the

copyright in such picture (2). Moreover, although the intention of an infringer is immaterial, if he copies more than is fair, so that his copy may be used as a substitute for the original, as in *Ronworth v. Wilkes* (17), yet in doubtful cases the extent to which the copying has been carried and the object sought to be attained by the copies complained of are matters which must be considered, as is shown by *Bradbury v. Hotten* (8) and *Scott v. Stanford* (11). The extent of copying and the degree of resemblance between the original and the copy are always most material, as was pointed out long ago in *West v. Francis* (12).

Guided by the foregoing considerations and by the principles acted upon in the decisions to which I have referred, I ask myself whether these sketches are such copies of the plaintiff's pictures, or such reproductions of the designs thereof, as are struck at by the statute which confers copyright in such pictures. My answer to this question is, No. The sketches are not intended to be, and are not in fact, copies of the pictures at all, neither are they intended to be, nor are they in fact, reproductions of the designs of the pictures. They do not represent any of the beauties of the pictures. They are rough sketches, made for a very different purpose and answering a very different purpose, that purpose being, not to give an idea of the plaintiff's pictures, but to give a rough idea of what is to be seen at the Empire Theatre. In giving that idea it is true that they also give a very rough idea of the subject represented in the plaintiff's pictures. It is also true that in *West v. Francis* (12) Mr. Justice BAYLEY said, "A copy is that which comes so near to the original as to give to every person seeing it the idea created by the original." But in applying this to any particular case the degree of resemblance is all important, and the possibility of injury to the plaintiff must be regarded, as was pointed out in *Dicks v. Brooks* (4). It is only by a great stretch of language and by the exercise of much imagination that these sketches can be regarded as copies of the plaintiff's pictures or the designs thereof. The case is very unlike *Gambart v. Ball* (10), where engravings were copied by photography. I cannot bring myself to say that the sketches complained of are, in any fair sense of the words, copies of the plaintiff's

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pictures or reproductions of the designs thereof within the meaning of the statute to which I have referred. The question, if it came before a jury, would be one of fact for the decision of the jury, on a proper exposition by the Judge of the meaning of the statute, and I do not believe that any jury, properly directed, would find these sketches to be copies of the plaintiff's pictures or reproductions of his designs. The defendants have not, in fact, directly or indirectly, intentionally or unintentionally, made any use, certainly not any unfair use, of the plaintiff's pictures or of the brains of their authors. This, in my opinion, settles the case.

In order to avoid misunderstanding, I will observe that I do not think that the competition test is necessarily conclusive. I agree that if the defendants had copied the plaintiff's pictures they would have infringed his rights, even although the use made by the defendants of such copies could in no way compete with the sale of the plaintiff's pictures. This was the case in *Hanfstaengl v. Holloway* (3), where copies of the plaintiff's pictures were only used by being put on pill-boxes, but were nevertheless held to be infringements of his rights. Again, unauthorized sketches of pictures made on purpose to convey, and, in fact, conveying, tolerably correct ideas of them would, I apprehend, be infringements of the copyrights in them, although the sketches might not compete with the pictures or with any copies of them which their authors or their assigns might desire to make or sanction. But where copying a picture never enters the head of a person who is said to have copied it or to have reproduced its design, where the question is whether a sketch by such a person is or is not a copy or reproduction, then the impossibility of injury by competition may, I think, be fairly considered. The amusing sketches in "Punch" of the pictures in the Royal Academy are not, in my opinion, infringements of the copyrights in those pictures, although probably made from the pictures themselves. The application of similar principles to the different facts of this case leads me to a similar conclusion. In neither case is there any piracy, actual or intended.

In my opinion, therefore, the appeal must be allowed, and judgment must be entered for the defendants, with costs here and below.

LOPEZ, L.J.: The substantial question in this case is whether the drawings in the "Daily Graphic" are piratical copies, piratical reproductions of the author's (*i.e.*, the plaintiff's) pictures or of the design thereof within the meaning of the statute. This is a question of fact, and if determined in the negative determines the case.

I deal with this case as governed by English law. It is most material in the first place to consider the object of the Act of Parliament, 25 & 26 Vict. c. 68, which first gave copyright in paintings, drawings, and photographs, and especially sections 1 and 2 of that Act, upon the interpretation of which this case depends. The object of the statute was to protect property, to protect the artistic faculty in painting, drawing, and photography, and to prevent any interference by reproduction thereof with either the artist's reputation or the commercial value of his work. See *Gambart v. Ball* (10) and *Dicks v. Brooks* (4), per Lord Justice BAGGALLAY. There must be no such reproduction either mediately or immediately. The artist is to be protected in respect of that which is his own meritorious work. A reproduction of his design or part thereof by any means and in any size is an infringement. But there must be such a reproduction as I have described. It is not every reproduction that amounts to an infringement. Thus in *Dicks v. Brooks* (4), a Berlin woolwork pattern was held not to infringe the copyright in an engraving, and there are expressions in the judgment in that case with regard to what constitutes a copy which appear to be most appropriate to the case now under consideration and which I shall presently refer to.

The short history of the drawings in the "Daily Graphic" is as follows: Artists instructed by the managers of the "Daily Graphic" visited the Empire Theatre and made sketches of the living representations of the plaintiff's pictures which were then to be seen in the shape of *tableaux vivants*, and from these sketches were made drawings of which reproductions by mechanical means appeared in the "Daily Graphic" of 8 February, 1894. These are the infringements complained of.

It has been held that the living representations at the Empire Theatre are not infringements (2): That the drawings in question are not taken directly from the plaintiff's pictures but from living

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representations of them is immaterial, provided they are copies of the plaintiff's pictures within the meaning of the statute. Nor is it necessary that there should be knowledge on the part of those charged with infringement that they were copying the plaintiff's pictures. In this case admittedly they knew they were copying the pictures of some artist. But are they copies within the meaning of the Act of Parliament? Are they piratical imitations of the plaintiff's pictures, imitations of anything which was the artist's meritorious work? They may be correctly described as rough, rude drawings, devoid of any artistic merit; there is no attempt to reproduce the merits of the originals; no attempt at art, much less fine art; that which is attractive in the originals is absent, and they appear to me to have little more claim to be regarded as copies of the originals than the Berlin woolwork pattern had to be regarded as a copy of Millais' picture "The Huguenots." In that case Lord Justice JAMES said: "Nobody would ever take it to be the print, nobody would ever buy it instead of the print, . . . It is a work of a different class, intended for a different purpose, and no more intended to injure the print *quod* print or the reputation of the engraver or the commercial value in the hands of the proprietor than if the same group were reproduced from the same engraving by waxwork at Madame Tussaud's or in a plaster of Paris cast or in a painting on porcelain. . . . Whether dealing with it as a matter of law or dealing with it, as we must do, as a matter of fact, I am satisfied that the pattern is not a copy or piracy of any part of that which constituted the real merit and labour of the defendant." Substituting the word picture for print and drawings for pattern, every word of this judgment appears to me applicable to the present case. No doubt there is a resemblance between the drawings and the plaintiff's picture, but not that kind of resemblance struck at by the statute. Mr. Justice BAYLEY in *West v. Francis* (12) defined a copy to be "that which comes so near to the original as to give every person seeing it the idea created by the original." Can it be said that these drawings come so near to the originals as to give those seeing them the same idea as that which would be created by the originals?

Section 2 of the Act has no application to the present case.

Holding as I do that these drawings are not infringements according to English law, it is unnecessary to say anything with regard to German law, though I agree with what has been said by Lord Justice LINDLEY.

In my judgment these drawings in the "Daily Graphic" are not copies of the plaintiff's pictures or reproductions of the design thereof within the meaning of the statute, and therefore the appeal must be allowed.

DAVEY, L.J.: I have had an opportunity of reading the judgment which has been delivered by Lord Justice LINDLEY, and I entirely agree with it, and I only wish to add a few words of my own.

The principal question in this case is whether in the language of the Fine Arts Copyright Act, 1862, the defendant has infringed the plaintiff's exclusive right of copying, reproducing, and multiplying certain pictures of the plaintiff and the design thereof.

It is unnecessary for me to repeat the statement of the facts of this case which has already been made. I will only observe that the fact that the sketches complained of were made from, and were intended to describe, the representations at the Empire Theatre, would not prevent their being infringements of the plaintiff's copyright if such sketches are reproductions or copies of the plaintiff's pictures or the design thereof within the meaning of the Act.

Now the first matter that one has to consider in these cases is what was the object and intention of the statute. As was very well pointed out in the case of *Gambart v. Ball* (10), and in *Dicks v. Brooks* (4), the object of these Acts is both to protect the reputation of the artist from being lessened in the eyes of the world and also to secure him the commercial value of his property—to encourage the arts by securing to the artist a monopoly in the sale of the object of attraction.

The pictures of which these sketches are said to be a piratical copy or reproduction are works of art calculated to please the eye and the taste by a beautiful arrangement of form and colour, and to excite the emotions by the scenes depicted and thoughts suggested by the imagination or fancy of the artist. As objects of attraction they depend not on the mere outline or configuration, but on the artistic feeling and power with which the subject is treated. The

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sketches before us are mere outlines, descriptive more or less accurately of the grouping and pose of the figures, and to a limited extent of the subject-matter of the pictures, but destitute of every thing which makes the pictures works of art and constitutes their claim to protection under the Act. What is a copy? I answer in the language of Mr. Justice BAYLEY in *West v. Francis* (12), "A copy is that which comes so near to the original as to give to every person seeing it the idea created by the original." Of course there may be a coarse or clumsy copy, but in my opinion it is impossible to say that these woodcuts give the idea created by the originals—at any rate, with such fulness or completeness as to make them copies or reproductions. The point is not that these things are bad copies, but that they are not intended and do not purport to reproduce the vital and essential qualities of the pictures as works of art, and are therefore not copies or reproductions at all within the meaning of the Act.

But it is said that the Act protects not only the picture but the design. These words are probably inserted in order to bring within the protection of the Act a copy through a different medium, *e.g.*, a black and white copy of a picture made by the engraver, the photographer, or the draftsman; but it must still be the design of the picture, and not a mere outline or descriptive sketch of it. The difference may at once be seen by comparing one of the photographs which have been shown to us with the woodcut or sketch complained of, and would, no doubt, be more striking if the sketch were compared with the picture itself which is the subject of copyright.

I do not think that section 2 will assist the defendants. I agree that "work" in that section means work of art, and I think that the first part of the section is directed to save the imitation or copies of works of art in which there is no copyright, and the second part is directed to the representation of scenes and objects which may previously have been represented by others—so that a man shall not, *e.g.*, by first painting a particular landscape or figure acquire an exclusive right to the representation or figure, although of course he may have copyright in his own representation of it.

I also agree that the German law as I understand it does not in the circumstances of this case restrict or narrow the plaintiff's rights. I do not think that we could properly hold that these sketches were merely for the illustration of the written text. I think it would be more true to say that the text is accessory to and explanatory of the pictorial description of the performances at the Empire Theatre. But for the reasons I have given I hold that these sketches are not copies or reproductions within the meaning of the Act.

Appeal allowed (18).

Solicitors : *Lewis Basil Thomas*, for the Appellants.

Herbert Bentwitch, for the Respondent.

Mellor, Smith & May, for the Proprietors of the
"Westminster Budget."

(18) The House of Lords on 17 December, 1894, affirmed this decision.

LUMLEY IN RE, HOOD BARRS v. CATHCART.

1894, June 6, 18. LINDLEY AND DAVEY, L.JJ.

Execution—Sequestration—Married Woman—Restraint on Anticipation—Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 19—Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), s. 2.

Rents accruing after judgment of property subject to a restraint on anticipation cannot be taken in execution under a writ of sequestration, or by means of a receiver.

Hood Barrs v. Cathcart (1) followed.

Section 2 of the Married Women's Property Act, 1893, which enables the Court in certain circumstances to order and enforce payment of costs out of property subject to a restraint on anticipation, does not give jurisdiction to alter or vary an order for payment of costs made before the Act came into operation, or to make a new order for payment of the same costs.

APPEAL from North, J.

By three orders dated respectively 9 June, 21 June, and 19 October, 1893, certain applications by motion and summons of Mrs. Mary Cathcart, a married woman, were dismissed with costs. These costs, which were afterwards taxed at 115*l.* 1*s.* 2*d.*, were payable to Henry H. Hood Barrs, a solicitor. The order of 9 June simply directed payment of the costs by Mrs. Cathcart, without more. The other two were in the form settled in *Scott v. Morley* (2), and directed that execution against Mrs. Cathcart should be limited to her separate estate not subject to any restraint on anticipation, unless by reason of section 19 of the Married Women's Property Act, 1882, the property should be liable to execution notwithstanding such restraint. Mrs. Cathcart was tenant for life of certain real estate for her separate use without power of anticipation.

On 15 January, 1894, Mr. Justice NORTH made an order which (as varied by the Court of Appeal) gave Hood Barrs leave to issue a writ of sequestration against Mrs. Cathcart's separate estate,

(1) 9 R. 802; [1894] 2 Q. B. 559; 63 L. J. Q. B. 602; 70 L. T. 865; 42 W. R. 628.

(2) 20 Q. B. D. 120; 57 L. J. Q. B. 43; 57 L. T. 919; 36 W. R. 67.

execution being limited in the same manner as in the orders of 21 June and 19 October for payment of the costs (3).

On 29 March, 1894, the Vacation Judge granted an injunction restraining Mrs. Cathcart from receiving her rents due at Lady Day and those in arrear.

On 27 April, 1894, Hood Barrs moved before Mr. Justice NORTH to continue the injunction, or that a new writ of sequestration might be issued, or that a receiver of the rents in arrear might be appointed. There were no rents in arrear which had become due at the dates of the orders for payment of costs. Mr. Justice NORTH refused the motion with costs. Hood Barrs appealed.

Hopkinson, Q.C., and Bartley Denniss, for the appellant :

Rents which accrue due after the judgment are from the moment they accrue in the same position as any other property Mrs. Cathcart is entitled to for her separate use.

[DAVEY, L.J.: *Chapman v. Biggs* (4) and *Draycott v. Harrison* (5), which are directly in point, are against you.]

Even if we are right, some effect is given to the restraint: if it did not exist the sequestrators would sell the married woman's interest.

[DAVEY, L.J.: The decision of Mr. Justice PEARSON in *In re Andrews, Edwards v. Dewar* (6), goes even beyond what you want.]

Even if an order can be enforced against future property when it accrues, such property is not at the date of the order bound or charged, and cannot be said to be "anticipated." The married woman herself may charge or dispose of the property as soon as it becomes due, and therefore her creditors may do the same. That is all we claim. The whole thing seems to have gone upon the de-

(3) 7 R. 179; [1894] 2 Ch. 271; 63 L. J. Ch. 435; 73 L. T. 780; 42 W. R. 401.

(4) 11 Q. B. D. 27; 48 L. T. 704.

(5) 17 Q. B. D. 147; 34 W. R. 546.

(6) 30 Ch. D. 159; 54 L. J. Ch. 1049; 53 L. T. 422; 34 W. R. 62.

cision in *Pike v. Fitzgibbon* (7), which shows that a married woman cannot contract at all in the ordinary sense.

[DAVEY, L.J.: Could a married woman make a bargain to pay out of her restrained income when she should receive it? If she could not voluntarily do that, could the order of the Court do it?]

The Married Women's Property Act, 1893, came into force on 5 December, 1893, but section 2 (8) shows that it applies to this case. These costs are costs of a proceeding "instituted" by Mrs. Cathcart, namely, of an application to set aside an execution. Applications to the Court in a matter may be made after dismissal with costs; and so long as that can be done the case is "pending" within section 2.

[LINDLEY, L.J.: Does it mean more than that the Act would apply if the married woman continued to prosecute some proceeding begun before the Act?]

In *Salt v. Cooper* (9), JESSEL, M.R., says: "A cause is still pending even though there has been final judgment given, . . . provided that judgment has not been satisfied." In *re Clagett's Estate*, *Fordham v. Clagett* (10), is to the same effect.

[DAVEY, L.J., referred to *Beckett v. Tasker* (11) and *Holtby v. Hodgson* (12).]

It is clear that income accruing after the contract may be taken; so may income accrued after judgment.

(7) 17 Ch. D. 454; 50 L. J. Ch. 394; 44 L. T. 562; 29 W. R. 551.

(8) Section 2 of the Married Women's Property Act, 1893, enacts that:—

"In any action or proceeding now or hereafter instituted by a woman or by a next friend on her behalf, the Court before which such action or proceeding is pending shall have juris-

diction by judgment or order from time to time to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation, and may enforce such payment by the appointment of a receiver and the sale of the property or otherwise as may be just."

(9) 16 Ch. D. 544, 551; 50 L. J. Ch. 529; 43 L. T. 682; 29 W. R. 553.

(10) 20 Ch. D. 637, 653; 51 L. J. Ch. 461; 46 L. T. 70; 30 W. R. 374.

(11) 19 Q. B. D. 7; 56 L. T. 636; 36 W. R. 158.

(12) 24 Q. B. D. 103; 59 L. J. Q. B. 46; 62 L. T. 145; 38 W. R. 68.

[They also cited *Cox v. Bennett* (13), *Claydon v. Finch* (14), and *In re Glanvill, Ellis v. Johnson* (15).]

[DAVEY, L.J., referred to *Stanley v. Stanley* (16).]

Mrs. Cathcart, the respondent, who appeared in person, was not called upon.

Cur. adr. vult.

June 18.

The judgment of the Court was delivered as follows by

DAVEY, L.J. : This was an appeal from Mr. Justice NORTH against an order made by him on 27 April, 1894, dismissing with costs a motion by Mr. Hood Barrs in this matter. It was heard by Lord Justice LINDLEY and myself. In this case Mr. Hood Barrs was appellant and Mrs. Cathcart was respondent. [The Lord Justice stated the facts, and continued :] Mr. Justice NORTH has held that the rents in arrear could not be taken in execution under the existing writ of sequestration, and that the plaintiff was not entitled to a fresh writ or to a receiver for the purpose of taking these arrears in execution on any of the three orders for costs above mentioned. The general question involved in this case was dealt with in the judgment delivered by the other division of this Court in the case of *Hood Barrs v. Cathcart* (1); it follows from that decision that the learned Judge took a correct view of the general question, and that his judgment on the main point ought to be affirmed in this case.

But the appellant raised another point, founded on the second section of the Act of last year, 56 & 57 Vict. c. 63. That section is as follows : [The Lord Justice read the section (8) and continued :] It was said that these are orders for payment of costs, and inasmuch as they were made on applications by motion or summons by Mrs. Cathcart herself they were made in a "proceeding instituted" by her, notwithstanding that the matter in which they were made was initiated by the petition of the present appellant or Messrs. Lumley.

(13) [1891] 1 Ch. 617; 60 L. J. Ch. 651; 64 L. T. 380; 39 W. R. 401.

(14) L. R. 15 Eq. 266; 42 L. J. Ch. 416; 28 L. T. 101.

(15) 31 Ch. D. 532; 55 L. J. Ch. 325; 54 L. T. 411; 34 W. R. 309.

(16) 7 Ch. D. 589; 47 L. J. Ch. 256; 37 L. T. 777.

It is unnecessary to decide whether that contention was correct. Assuming it to be so, we are of opinion that the section does not give the Court jurisdiction to alter or vary an order for payment of costs made before the Act came into operation, or to now make a new order for payment of the same costs. We are therefore of opinion that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors : *Hood Barrs & Co.*, for the Appellant.

IN RE AKEROYD'S SETTLEMENT, ROBERTS *v.*
AKEROYD.

1893, August 8. LINDLEY, LOPES AND A. L. SMITH, L.JJ.

Marriage Settlement—Construction—Trust for Wife for Life and afterwards for Husband until his Bankruptcy, etc., or Death—Limitation over to Children “after the Decease of the Survivor.”

Certain interests to which a wife was entitled were, upon her marriage, settled upon trust for her for life, and after her death the income was directed to be paid to the husband until he should become bankrupt or should alienate the same, or until his death, which should first happen. “After the decease of the survivor” the trust funds were to be held in trust for the children of the marriage. In February, 1883, the husband filed his petition in bankruptcy, and resolutions for liquidation by arrangement were subsequently passed by his creditors. In March, 1893, the wife died:—

Held, that the words “after the decease of the survivor” etc., must be construed as “after the determination of the interests hereinbefore given;” and that, therefore, the children became entitled to the income of the trust funds as if the husband were dead.

In re Tredwell, Jeffray v. Tredwell (1) distinguished.

By a settlement dated 12 February, 1873, and made on the marriage of Joseph Akeroyd with Mary Smith Croft, the contingent share and interest of the wife in a sum of 4,000*l.* under the will of James Dickinson, and in the estate of William Dickinson, were assigned to trustees upon trust, to invest the same when received, and to pay the annual income to the wife during her life for her sole and separate use, and after her death to her husband until he should become bankrupt or should assign, charge, or otherwise dispose of the same or attempt to do so, or until he should do some other act, or some other event should occur, whereby the same income, if payable to himself, would become vested in some other person or persons, or until his death, which should first happen; and “after the decease of the survivor of the said Mary Smith Akeroyd and Joseph Akeroyd,” then as to as well the capital of the trust premises as the annual income thereof in trust for the children and remoter issue of the marriage as therein mentioned. The settlement contained a power for the trustees, with the consent in writing of the husband and wife during their joint lives, and of the survivor during his or her life, and after the decease of the survivor,

at the discretion of the trustees, to raise any part not exceeding one-half the expectant share of any child for his or her advancement or benefit. The power of appointing new trustees was vested in the husband and wife during their joint lives, and in the survivor during his or her life.

The contingent interest given to Mrs. Akeroyd by the will of W. Dickinson was for her separate use, and that given to her by the will of J. Dickinson, was given to her absolutely. Both interests had since become vested and fallen into possession.

On 6 February, 1883, a petition in bankruptcy was filed on behalf of J. Akeroyd, and on 26 February, 1883, a resolution was passed by his creditors for the liquidation of his affairs by arrangement, and a trustee was duly appointed.

In June, 1884, J. Akeroyd obtained his discharge.

On 30 March, 1893, Mrs. Akeroyd died, leaving six children surviving her, all of whom were infants and unmarried.

On 27 May, 1893, an originating summons was taken out by the trustees of the settlement, asking (*inter alia*) who was entitled to the income of the trust funds between the death of Mrs. Akeroyd and the death of J. Akeroyd, having regard to the forfeiture of his interest by his liquidation.

NORTH, J., considering himself bound by the decision in *In re T'redwell* (1), made an order that the terminable life interest of J. Akeroyd, under the settlement to which he was entitled in reversion contingently on surviving Mrs. Akeroyd, was forfeited by reason of the resolution of 26 February, 1883, for the liquidation of his affairs by arrangement; that the interest of the issue of J. Akeroyd and Mrs. Akeroyd did not take effect in possession until the death of the survivor of them, J. Akeroyd and Mrs. Akeroyd; and that the income of the trust funds as from the death of Mrs. Akeroyd and during the remainder of the life of J. Akeroyd was not disposed of by the settlement. And his Lordship declared that the income of the fund derived under the will of W. Dickinson belonged to the administrator of the estate of Mrs. Akeroyd, and the income of the fund derived under the will of J. Dickinson belonged to the trustee in the liquidation of J. Akeroyd.

The children, by their guardian *ad litem*, appealed.

Sir Horace Davey, Q.C. (H. J. Hood with him), for the appellants :

The decision in *In re Tredwell* (1), upon which NORTH, J., decided this case, turned upon the apparent intention of the testator there, and does not apply to the present case, because here the clear intention was that the whole interest should be settled, and that the limitation in favour of the children of the marriage should take effect on the determination of the prior interests under the settlement, whenever occurring. It could never have been intended that there should be a gap in the trusts of the settlement. The children are therefore entitled to the income of the trust funds as if their father were dead.

He cited *Underhill v. Roden* (2), *Jones v. Westcomb* (3), *In re Stanford*, *Stanford v. Stanford* (4).

Levett, Q.C. (Gatey with him), for the trustee in the liquidation.

G. P. C. Lawrence, for J. Akeroyd.

E. Beaumont, for the trustees of the settlement.

LINDLEY, L.J. : This case is a little curious by reason of the complication of the title ; but as regards the construction of the settlement I do not feel any difficulty. The wife is entitled, as appears by recitals, to a contingent interest under the will of James Dickinson, and also to a contingent interest under the will of William Dickinson. Upon the marriage, it was agreed that both the contingent interests should be settled. Accordingly, they are vested in trustees, upon trust to pay the income of the trust property—as I will call it for shortness—to the lady for her life, for her sole and separate use, free from the control of her husband, and without power while under coverture to dispose thereof by way of anticipation, and after her death to the husband “until he shall become bankrupt.” Now, pausing there, I apprehend that that means exactly what it says—until he shall become bankrupt. That is at any time. According to the authorities, it means not only

(2) 2 Ch. D. 494 ; 45 L. J. Ch. 266 ; 34 L. T. 227 ; 24 W. R. 574.

(3) 1 Eq. Cas. Abr. 245.

(4) 34 Ch. D. 362 ; 56 L. J. Ch. 273 ; 55 L. T. 765 ; 35 W. R. 191.

(LINDLEY, L.J.)

“shall be bankrupt” after her death, but even before she dies. That point is covered by authority, and is plain enough. Then the settlement proceeds: “or shall assign, charge, or otherwise dispose of the same, or attempt to do so, or until he shall do some other act, or some other event shall occur whereby the same income, if payable to himself would become vested in some other person or persons, or until his death which shall first happen.” That is perfectly intelligible. Then there is a trust in remainder which does not fit all the events upon which his interest is to cease. The gift over is confined to the husband’s death. The clause says “after the decease of the survivor” of the wife and the husband—nothing being said about bankruptcy, or assignment, or anything else—then to the children. Then there are clauses as to advancement by the trustees. I confess that, without knowing anything at all concerning the events which have happened—about the date of his liquidation, the circumstances of his discharge, and when these interests fell into possession—but looking only at the recitals and at the operative part of the deed, it does appear to me to be as plain as can be, that the real intention of the parties was that this property was to go to the children upon the determination of the prior interests of their parents. I cannot doubt that for a moment. I do not call that guessing. The intention is plain, but by a piece of bad drafting the draftsman has failed to give full effect to that plain intention, because in the gift over he has confined it to one of the events, instead of putting in some general words which would cover the whole. But that particular kind of flaw does not require a suit to rectify the instrument. The mistake can be corrected by construction, provided the intention is clear and plain from the document itself. In *In re Tredwell* (1) we could not ascertain the intention. Here we can. I have not the slightest doubt as to the construction of this document. The whole of the property goes over to the children when they come of age. I cannot help thinking that Mr. Justice NORTH has attached too much importance to the decision in *In re Tredwell* (1), and overlooked for the moment the fact that we took great care to decide that case upon the ground that we could not see the intention which it was there contended was to be gathered from the document. Here we can; and I am

clearly of opinion that the true construction of this document is in favour of the appellants. I think that the appeal must be allowed.

LOPES, L.J. : I am of the same opinion. The draftsman of this deed, to my mind, has expressed himself imperfectly ; but I think, having regard to the clear illustration of the intention of the parties in the earlier part of this clause, what he meant was to make a gift over on the determination of the husband's interest by death or by bankruptcy. I cannot help thinking that this is the clear intention which is to be found in this particular clause. I test it in this way : Supposing a bankruptcy had occurred after the death of the wife, and supposing the husband survived his wife. If the contention urged on behalf of the trustee in the liquidation is right, all the property would then have gone to him. Now, it seems to me that this cannot be said to have been the intention of the parties. To my mind, it was the very thing that the clause was inserted to prevent. Mr. Justice NORTH has attached too much importance to the case of *In re Tredwell* (1). That case is distinguishable from the present one. Therefore, I think that this appeal should be allowed.

A. L. SMITH, L.J. : I am of the same opinion. Here is a trust to pay the income of the settled property to the wife for life, and after her death to her husband, until he becomes bankrupt or until he dies. After the death of the wife, and after the death or bankruptcy of the husband, it is to go over to the children. It seems to me perfectly plain that that was the intention of the parties. It is quite true the draftsman has said that, after the decease of the survivor of the wife and husband, the property is to go over, and the word "bankruptcy" is not there. What is the rule to be applied ? I understand the rule is accurately stated by Lord Justice LINDLEY, in *In re Tredwell* (1), where he says it is necessary "to see something in the will which convinces the mind that the testator must have meant that these legacies"—the equivalent to the gift over in this case—"should be paid at some time or other different from what he has said." In that case Lord Justice LINDLEY said he could find nothing, and Lord Justice BOWEN said

(A. L. SMITH, L.J.)

the same. But in this case I think we do ; and I think that Mr. Justice NORTH was led away, and very naturally, if I may say so, having been overruled in *In re Tredwell* (1) by the Court of Appeal. He thought he would be wrong if he decided as he had done before, and he gave the Court of Appeal their due in following what he thought they had held. In my judgment, he was in error there. In my opinion, the appeal must be allowed.

Appeal allowed.

Solicitors : *Darley & Cumberland*, for the Appellants.

Beckford & Hall ; J. T. Rossiter, for the Respondents.

HOOD BARRS v. CATHCART.

1894, July 30. LINDLEY, LOPES AND DAVEY, L.JJ.

Married Woman—Liability for Costs — “Proceedings instituted” — Married Women’s Property Act, 1893 (56 & 57 Vict. c. 63), s. 2.

Section 2 of the Married Women’s Property Act, 1893, only contemplates the case of a married woman plaintiff. Although unsuccessful, she cannot be made to pay the costs of interlocutory proceedings taken, or appeals brought by her, in an action in which she is defendant.

APPEAL from North, J.

The defendant in this action had been unsuccessful in two appeals—one to the Divisional Court, which was heard and dismissed with costs on 14 December, 1893, and the other to the Court of Appeal, which was heard and dismissed with costs on 12 February, 1894. Subsequently to these orders, an order was made for the transfer of the action from the Queen’s Bench Division to the Chancery Division. On 2 July, 1894, NORTH, J., made an order giving leave to issue a writ of sequestration for the costs of the appeals, which said nothing about the restraint upon anticipation. On 13 July, 1894, upon motion by the defendant, his Lordship discharged the order of 2 July, and a motion to vary of which the plaintiff had given notice fell through.

This appeal was brought to obtain leave to issue a writ of sequestration and to add a direction that it should not be limited to property which the defendant was not restrained from anticipating.

Hopkinson, Q.C., and C. Johnston Edwards, for the appellant :

These were proceedings instituted by a married woman within the meaning of the Married Women’s Property Act, 1893. An order such as we are asking for was made by the Divisional Court in an action between the same parties on 26 July of this year, and by WRIGHT, J., in Chambers.

[DAVEY, L.J. : The difficulty is that these cases in Chambers are not argued.]

LINDLEY, L.J.: I do not think we need take any time to consider this case, or that we need hear Mrs. Cathcart.

The substantial question is, whether section 2 of the Married Women's Property Act, 1893, can be applied to this case. For the appellant it is contended that the orders were made after the passing of the Act, and that the appeals by Mrs. Cathcart, which were dismissed after the passing of the Act, were proceedings instituted by her within the meaning of section 2. I will read the section: "In any action or proceeding now"—that is, 5 December, 1893—"or hereafter instituted by a woman or by a next friend on her behalf, the Court before which such action or proceeding is pending shall have jurisdiction by judgment or order from time to time to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation, and may enforce such payment by the appointment of a receiver and the sale of the property or otherwise as may be just." The question which we have to consider is, what is the true construction of the words "in any . . . proceeding hereafter instituted by a woman or by a next friend on her behalf"? It is contended it will include appeals or applications of any kind, made by a married woman who is sued, in which she is unsuccessful. It appears to me the language does not apply to such a case as that. The word "instituted" is important, and means some proceeding in which the woman is the *actor* at starting, and applies to such a case as an originating summons, petition, or originating motion—something which really commences proceedings—and I do not think the expression "proceedings" does include motions moved or appeals brought by a married woman defendant. Where frivolous appeals are brought and the married woman is not plaintiff, I do not think the language is large enough to apply to such proceedings. I think the appeal must be dismissed.

LOPES, L.J.: The important question which arises in these appeals is under section 2 of the Married Women's Property Act, 1893, which it was suggested included appeals in an action in which a married woman is defendant. Now, in my judgment, it does not. I will read the words. [His Lordship did so, and continued:] "Instituted" conveys to my mind the idea of commencement of a proceeding—such, for instance, as an originating summons

—in which the married woman is the *actor*, the moving party. I think, therefore, the appeal fails.

DAVEY, L.J.: I am of the same opinion, and were it not the first occasion on which the construction of this section came before us, I should content myself with expressing my concurrence with the judgments just delivered.

The counsel for the appellant contend that the words "proceeding instituted by a married woman" mean any motion or step taken by a married woman in any action, although it may be an action in which she is a defendant, and not in the position of a plaintiff. It seems to me that such a case is not within the words. It must be borne in mind that an appeal is in the nature of a defence by the person who is appealing, if there be an order made against him or her. The words "action or proceeding" must mean some action or proceeding in the nature of an action; in other words, a proceeding by which a *lis* is initiated. I think the word "instituted" would be an inapt word to use for any purposes suggested on behalf of the appellant. I have never heard of an appeal, or a motion, or a summons being "instituted," but all of us are accustomed to speak of the institution of a suit. I think the words "from time to time" point out what is meant. The words are "the Court shall have jurisdiction by judgment or order from time to time to order payment of the costs." That is to say, wherever a married woman commences litigation as plaintiff, then if in any step in the action, or in any proceeding in the action, she is ordered to pay the costs, the Court in such an action, or proceeding, or litigation can order the costs to be paid out of her separate estate which she is restrained from anticipating. The costs will be set off.

LINDLEY, L.J.: We have considered this section with all our colleagues, and we are all agreed as to its construction.

Solicitors: *Hood Barrs & Co.*, for the Appellant.

IN RE HARDING, ROGERS v. HARDING.

1894, July 12. LORD HERSCHELL, L.C., AND LINDLEY AND DAVEY, L.JJ.

Deed—Construction—Power of Appointment—Survivorship—Revocation.

Under a trust in a marriage settlement for the children of the marriage as the husband and wife shall by deed with or without power of revocation and new appointment jointly appoint, and in default of and subject to any such joint appointment as the survivor shall by deed with or without power of revocation and new appointment or by will appoint, a joint appointment expressed to be made subject to the power of revocation and new appointment mentioned in the settlement may be revoked by the survivor and a new appointment made.

Brudenell v. Elwes (1) and *Dixon v. Pyner* (2) followed.

APPEAL from North, J.

By a settlement dated 8 December, 1846, and made on the marriage of John Wingfield Harding with Elizabeth Anne Raymond Barker, a sum of about 12,000*l.* was settled upon trust, after the death of the survivor of the husband and wife, for the children of the marriage, "as the said J. W. Harding and E. A. R. Barker during their joint lives by any deed or deeds by both of them legally executed and either with or without power of revocation and new appointment shall from time to time appoint, and in default of and subject to such joint appointment, then as the survivor of them the said J. W. Harding and E. A. R. Barker shall after the decease of the other of them by any deed or deeds by him or her legally executed with or without power of revocation and new appointment or by his or her last will and testament or any codicil or codicils thereto in writing from time to time appoint," and in default of and subject to such joint or other appointment upon trust for all and every the child or children who, being a son or sons, should attain the age of twenty-one years, or being a daughter or daughters, should attain that age or marry, in equal shares.

In 1878 a sum of 2,000*l.*, part of the trust fund, was appointed by the husband and wife jointly to a daughter, and a further similar sum to another daughter.

(1) 1 East, 442; 6 R. R. 310.

(2) 55 L. J. Ch. 566; 54 L. T. 748; 34 W. R. 528.

By a deed of appointment dated 30 January, 1881, which recited the marriage settlement so far as indicated the joint power of appointment with or without power of revocation and new appointment conferred thereby, but did not recite it further (*i.e.* omitted any reference to the power reserved to the survivor in default of and subject to the joint appointment), it was witnessed that "in pursuance of the power or authority for that purpose given or reserved to them by the hereinbefore recited indenture and of every other power then in anywise enabling them in this behalf," the husband and wife did appoint the unappointed residue of the trust in the manner thereafter mentioned. The deed concluded with the following clause: "7. The appointments made by these presents are made subject to the power of revocation and new appointment mentioned in the hereinbefore recited indenture."

The wife died on 10 February, 1881.

By a deed poll dated 10 March, 1886, the surviving husband purported to revoke the joint appointment made by the deed poll of 30 January, 1881, and to make a new appointment reserving a power of revocation; and by another deed poll dated 14 August, 1888, he purported to vary the appointment of 10 March, 1886.

The husband died on 6 June, 1893.

The trustees of the settlement of 8 December, 1846, took out a summons for the determination of the question whether the husband, after the death of the wife, had power to revoke, and did, by the deeds poll of 10 March, 1886, and 14 August, 1888, effectually revoke the joint appointment of 30 January, 1881.

On 24 April, 1894, NORTH, J., held that the revocation and new appointment by the deed poll of 10 March, 1886, were valid.

A defendant interested under the joint appointment appealed.

Cozens-Hardy, Q.C., and J. G. Butcher, for the appellant:

There are two powers conferred by the settlement of 1846—one to the husband and wife jointly, another in default of joint appointment to the survivor. The joint appointment by the deed of 1881 could not reserve a power of revocation to one of the appointors,—to the survivor of the donees of the power. Only one power of revocation—namely, that given by the settlement to the two

jointly,—could be and was reserved by the deed of joint appointment.

Even if there could be reserved a power of revocation to the survivor, such a power has not in fact been reserved.

[They referred to *Brudenell v. Elwes* (1), *Dixon v. Pyner* (2), and Sugden on Powers, 8th edit., p. 387.]

If clause 7 does refer to two powers, a joint power of revocation and new appointment, and also a separate power to the survivor, you may refer to the recitals to explain the ambiguity which thus appears in the body of the deed, and there you find no reference at all to any power in the survivor, and you may restrict the meaning of the operative part accordingly. If the operative part were clear and unambiguous, we should not contend it could be cut down by the recitals.

Swinfen Eady, Q.C., and *G. P. C. Lawrence*, for a certain respondent, were not called upon to argue.

Methold, for other respondents having similar interests.

B. B. Rogers, for the trustees.

LORD HERSCHELL, L.C.: This is an appeal from a decision that a deed poll of 10 March, 1886, effected a valid revocation of a joint appointment made in 1881, and created a new appointment. [His Lordship stated the facts shortly, and proceeded:] It is contended now that there was no power in the survivor of the two donees of the power given by the settlement to revoke the joint appointment made by the deed of 1881, for two reasons: first, because, it is said, power to revoke the joint appointment could only be reserved to the husband and wife jointly; and, secondly, because, even if it could be reserved to the survivor alone, it has not in fact been effectually reserved.

In *Brudenell v. Elwes* (1), under marriage articles a power of appointment was limited, after the death of the husband and wife, unto and amongst all or any the child or children of the marriage in such parts and proportions, and for such estate and estates, and with and under such charges, provisoes, conditions, and limitations as the husband and wife, or the survivor of them, should from time

to time, by any deed or writing, either with or without power of revocation, or by his or her last will in writing, direct, limit, and appoint, and in default of such appointment the lands were to go to the first and other sons in tail male. A joint appointment was made by the two, and the question for the Court was whether a revocation by the survivor was good. Lord KENYON said: "I see no reason to doubt but that the appointment by the wife alone, by the deed of 1773, was a good appointment as far as it is warranted by the power, and that it is a good revocation of the prior appointment of 1768. The marriage articles meant to give a joint power of appointment to the husband and wife during their lives, and after the death of either, that the survivor should have equal power to revoke and make a new appointment. It seems clear that an equal degree of confidence was reposed in both husband and wife; and as it could not be foreseen what alterations the exigency of the family might from time to time require, it was thought more prudent to leave the survivor of them, whichever it might be, the same power to mould the appointment that had been committed to both while living." That seems to me to indicate the principles applicable to guide the Court in the case of a marriage settlement of this description.

But it is said that in the present case we have a power which is not a single power, as in *Brudenell v. Elwes* (1), but two powers. I think there is a fallacy in that proposition. No doubt the powers here are contained in two separate clauses, whereas in *Brudenell v. Elwes* (1) they were contained in one clause. But, where there is a power to two persons jointly, and again to the survivor of them, you have two powers. In either case, whether they are contained in one clause or in two, they are as much two powers in the one case as in the other. It is not the mode of granting that makes two powers. Accordingly, I see no distinction between the present case and *Brudenell v. Elwes* (1).

The power in the marriage settlement is to make the appointment with or without power of revocation, and it does not say "revocation by them." Was it intended to limit the power of revocation to the two, or was it intended to allow the survivor to have the power to revoke the joint appointment? I cannot doubt that the

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intention, in case of the exercise of the joint power of appointment, was to give power of revocation to the survivor.

Then, has that power been in fact effectually given to the survivor by the deed of 30 January, 1881? That deed says in clause 7 that the appointment thereby made is made "subject to the power of revocation and new appointment mentioned" in the settlement of 1846. It does not say, "subject to the power recited in these presents." It seems to me that that clause means that whatever power could be reserved consistently with the terms of the settlement has been reserved. The only suggestion to the contrary is that it is said that you may look at the recitals of the deed, and that if you do you find that there is no reference to any power being reserved to the survivor. It seems to me impossible to give effect to the recitals and not to clause 7, and thus to allow the appellant's contention.

In my judgment the appeal must be dismissed.

LINDLEY, L.J.: I am of the same opinion. I am only able to go so far with the appellant's contention as to allow that it is possible to read the power conferred by the settlement as two powers. The effect of acceding to the contention of the appellant would be to defeat the intention of the parties. What is the object of this settlement of 8 December, 1846? It is, as is the object of such settlements generally, to give to the parties concerned certain powers, to come into operation according as the exigencies of the family may require; it is impossible at the time when the settlement is made to foresee what may happen in years to come, and the object of the settlement is to give power to meet the contingencies of the future.

This view carries out the intention of the parties. Are we to say, when it is possible to read a deed in two ways, that it is to be read in that way which is open to a difficulty rather than in that way which carries out the intention of the parties?

In my opinion, after the decision of *Dixon v. Pyner* (2), this case is unarguable, and the appeal must be dismissed.

DAVEY, L.J.: I cannot bring my mind to say that there is any real difficulty in this case. It seems to me that there are two

powers in this case. The power in *Brudenell v. Elwes* (1) was so treated, where Lord KENYON says: "The marriage articles meant to give a joint power of appointment to the husband and wife during their lives, and after the death of either that the survivor should have equal power to revoke and make a new appointment." They are two powers in cases of this description, whether they are included in one clause, as in *Brudenell v. Elwes* (1), or are expressed in the more elaborate way adopted by modern conveyancers. After the case of *Brudenell v. Elwes* (1), which was approved by Lord ST. LEONARDS in his work on Powers (8th edit. p. 365), the case seems to me unarguable.

We are asked to say what is the meaning of "subject to the power of revocation and new appointment mentioned in the hereinbefore recited indenture" in clause 7 of the deed of 30 January, 1881. In my opinion, it means "subject to whatever power can be reserved by virtue of the hereinbefore recited indenture." The appellant's counsel contends that there is nothing in the deed to show any intention to reserve a power of revocation to the survivor. But it seems to me that it is for him to show something which restricts the natural meaning. He relies on the recitals. But when conveyancers put in recitals, it is usual for them to recite only so much as is necessary to show the power which is about to be exercised.

I think that, if we acceded to the appellant's contention, we should be defeating the object of the persons interested. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Wade & Lyall; Meredith, Roberts & Mills, for Baker, Son, James & Lillington, Weston-super-Mare; Walters, Deverell & Co.; and Hulberts & Hussey.*

ROSS v. WHITE.

1894, July 12, 13. LORD HERSCHELL, L.C., AND LINDLEY AND DAVEY, L.JJ.

Partnership—Action for Dissolution—Costs—Capital Withdrawn—Priority.

Where, in the administration of partnership assets, it is found that the assets are insufficient, a partner who has withdrawn more than his proportionate share of the capital must make good such excess in fact or in account before payment of the costs of the action.

APPEAL from Kekewich, J.

The plaintiff and the defendant carried on business in partnership under a partnership deed dated 7 October, 1890, which provided that they should each contribute 1,750*l.* to the capital of the firm, and should share profits and losses equally. On 12 March, 1891, the plaintiff brought an action, and on 20 March, 1891, KEKEWICH, J., made an order for the dissolution of the partnership. The order directed the usual partnership accounts. The chief clerk by his certificate dated 26 February, 1894, found that there was due from the partnership in respect of capital to the plaintiff the sum of 1,405*l.* 2*s.* 11*d.*, and to the defendant the sum of 804*l.* 15*s.* 4*d.*; that the only debt of the partnership was one of 649*l.* 2*s.* 4*d.* due to the plaintiff in respect of a loan; and that the property and effects belonging to the partnership consisted of 1,371*l.* 10*s.* 4*d.* in Court.

On the further consideration of the action it was admitted that the plaintiff's debt of 649*l.* 2*s.* 4*d.* was payable out of the fund in Court in priority to all other payments; but the question was whether the balance of that fund should be applied primarily in payment to the plaintiff of the sum of 600*l.* 7*s.* 7*d.* (being the difference between 1,405*l.* 2*s.* 11*d.* and 804*l.* 15*s.* 4*d.*, the sums due in respect of capital to the plaintiff and the defendant respectively), or in payment of the costs of the action. On 8 May, 1894, KEKEWICH, J., decided that the sum of 600*l.* 7*s.* 7*d.* was payable in priority to the costs, and that, if the fund in Court was insufficient to pay both, the balance of costs not provided for thereout should be paid by the plaintiff and the defendant equally.

The defendant appealed.

Renshaw, Q.C., and *Dickinson*, for the appellant :

The costs of the action should be paid in priority to the capital : *Lindley on Partnership*, 6th edit., p. 600, note *g* ; *Partnership Act*, 1890 (53 & 54 Vict. c. 39), s. 44. *Binney v. Mutrie* (1) was decided before the Act, but that makes no difference.

[They also cited *Austin v. Jackson* (2), *Potter v. Jackson* (3), *Butcher v. Pooler* (4), and *Rosher v. Crannis* (5).]

Warmington, Q.C., and *Dunham*, for the respondent :

The fund in Court should be applied first in paying debts of the firm, and next in putting the partners on a footing of equality as regards capital. *Lindley on Partnership*, 6th edit., pp. 518-21 ; *Hamer v. Giles* (6). It is the same thing whether one partner has advanced more capital than another, or withdrawn less. The creditor partner has a lien on the sum to which the debtor partner would be entitled for his costs.

[They also referred to *Rosher v. Crannis* (5), *Potter v. Jackson* (3), and *Binney v. Mutrie* (1).]

Renshaw, Q.C., in reply :

Hamer v. Giles (6) shows what is the right form of order. There is nothing in that case to support the learned Judge's decision.

[Lord HERSCHELL, L.C. : *Austin v. Jackson* (2) throws light on *Hamer v. Giles* (6).]

Lord HERSCHELL, L.C. : In this case, on the dissolution of the partnership, the accounts were taken under an order of the Court. As the result of these accounts it appears that there is a sum of 649*l.* due from the defendant to the plaintiff, that being a sum of money advanced by the one partner to the partnership, which, it is admitted, must be treated as a debt. About that there is no dispute. The finding is that each partner had originally con-

(1) 12 App. Cas. 160 ; 36 W. R. 129.

(2) 11 Ch. D. 942 n.

(3) 13 Ch. D. 845 ; 49 L. J. Ch. 232 ; 42 L. T. 294 ; 28 W. R. 411.

(4) 24 Ch. D. 273, 278 ; 52 L. J. Ch. 930 ; 49 L. T. 573 ; 32 W. R. 305.

(5) 63 L. T. 272.

(6) 11 Ch. D. 942, 948 ; 48 L. J. Ch. 508 ; 41 L. T. 970 ; 27 W. R. 834.

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tributed 1,750*l.* Each partner had drawn out some part of the capital which he had contributed, but the defendant had drawn out the sum of 600*l.* in excess of the sum drawn out by the plaintiff. The sole question which arises now is with reference to the payment of the costs of the plaintiff and the defendant in taking these accounts. For the appellant it is contended that the payment of these costs ought to be made out of the assets after the discharge of any debts due from the partnership, and before any distribution between the partners. It appears to me that that general proposition is well supported; but how is the matter to be dealt with in a case like the present, where the fund in Court, after the plaintiff has received from it the 600*l.* and the 649*l.*, is not sufficient to pay the costs? The counsel for the appellant contend that the costs ought to be paid out of the fund before the plaintiff is allowed to take from these assets the 600*l.* I cannot think that this view is correct. The effect of the transactions is this, that out of the assets of the partnership the defendant has really received 600*l.* in excess of what the plaintiff has received, and he claims that he shall take his costs out of the fund in Court without making good to the assets of the partnership that which he has taken out in excess of the sum taken out by the plaintiff. I think he cannot do so. Before he could claim to take his costs out of the assets he would have to make good to the assets the sum which is found due from him. He has, in truth, in his hands assets of the partnership, or what are to be considered as assets in adjusting the accounts between the plaintiff and the defendant, and out of this, no doubt, he can pay the costs; but he may not retain these assets and, without putting his partner on an equality with himself, claim to take these costs out of the assets which are in Court for the purpose of answering claims against the partnership. For these reasons I think the appeal ought to be dismissed.

LINDLEY, L.J.: I am of the same opinion. I agree with the argument for the appellant that the rule is that the costs must be paid before there can be any distribution between the partners, but I think that rule only applies when the assets are there, as they ought to be. When one comes to understand the case one sees

that, under cover of that argument, the appellant is seeking to make us sanction a gross injustice. The answer to his argument is unanswerable. Before he takes out any part of the assets which are in Court he must make good what is due from him to the partnership. I do not see that, until he has done that, he is entitled to get his costs.

DAVEY, L.J.: I agree that the order is right in substance, and that the appeal ought to be dismissed. I think that the appellant's main contention is right, that is to say, that before you adjust the rights of the partners *inter se* you must pay the costs incurred in a suit necessary for the purpose of taking the account and winding up the partnership. But the fallacy of the appellant's argument is to leave out of sight that the sum which he has overdrawn is really and truly part of the partnership assets. It is the application of the principle which I think is wrong in his argument. The principle can only be applied subject to this, that the defendant cannot take his costs until in fact or in account he has made good his obligations to the assets of the partnership. In other words, the principle does not apply as long as he has in his hands a part of what is really and truly the assets of the partnership, and, although it is quite true that he is entitled to his costs in the first instance, the plaintiff is entitled to say to him, "Pay them out of that which belongs to the partnership, and which you have in your hands." I think the form of the order rather obscures the point, but I think the order is right in substance, and that the appeal ought to be dismissed.

Appeal dismissed.

Solicitors: *Meredith, Roberts & Mills*, for *Sibly & Dickinson*,
Bristol, for the Appellant.
George Reader & Co., for *David Johnstone*, Bristol, for
the Respondent.

PRYOR v. PETRE.

1894, February 22. LINDLEY, KAY AND A. L. SMITH, L.JJ.

Conveyance—Land adjoining Highway—Presumption of Law—Rebuttal by Circumstances.

Where a deed of conveyance of land contiguous to a highway described the parcels, giving the acreage to the thousandth part of an acre, by reference to an Ordnance map and to a schedule and plan drawn on the conveyance, the measurements and corresponding numbers and colouring of which did not include any portion of the highway, and further contained a recital that the trees on the land to be sold had been valued and the amount of the valuation—which in fact did not include any of the trees upon the highway—formed part of the purchase-money:—

Held, that the presumption of law that a moiety of the highway passed by the conveyance was rebutted.

Berridge v. Ward (1) distinguished.

APPEAL from Romer, J.

By a conveyance dated 31 December, 1890, in consideration of 4,998*l.* 2*s.* 8*d.*, the defendant as tenant for life in execution of the power conferred on him by the Settled Land Act, 1882, and of every other power enabling him, granted and conveyed to the plaintiff in fee simple the messuage, farm, and lands in Margaretting, in the county of Essex, known as Bearman's Farm, and the woodlands known as King and Chapel Woods, comprising as to Bearman's Farm (with certain copyholds) 157·348 acres, and as to the Woodlands, 52·645 acres, both measurements being taken from the Ordnance Survey for the parish of Margaretting; the lands and premises being more particularly described in a schedule and delineated on a plan drawn on the conveyance wherein the freehold parts were edged with a pink, and the copyhold parts with a blue, line.

King Wood abutted on a public highway known as Coldhall Lane, which was a grassy lane about fifty feet wide, and was separated from the lands on either side of it by a ditch and a hedge; there were timber and other trees and underwood growing on the side of the lane abutting on King Wood. The plaintiff owned the land on the other side of the lane.

(1) 10 C. B. (N. S.) 400; 30 L. J. C. P. 218.

The plan drawn on the conveyance showed the pink line along the edge of King Wood, so as that it did not include any portion of Coldhall Lane. King Wood was numbered in the schedule and the plan as 77.

In the Ordnance map King Wood was numbered 77, and a moiety of Coldhall Lane, including that portion which was adjacent to King Wood, was separately numbered as 5.

The acreage set out in the conveyance as taken from the Ordnance Survey did not include any portion of Coldhall Lane.

The sum of 4,998*l.* 2*s.* 8*d.* above stated as the purchase-money was made up of two sums—one a sum of 3,673*l.* 8*s.* 2*d.*, which was estimated as the price of the land to be sold, and the other a sum of 1,324*l.* 14*s.* 6*d.*, which was the valuation agreed upon by two valuers and an umpire appointed for the purpose of the timber and other trees, tellers, and pollards, and underwood on the lands agreed to be sold. In making the valuation, no timber or other trees on any part of Coldhall Lane were taken into consideration or included among those which were valued.

The conveyance contained recitals that the defendant had contracted with the plaintiff for the sale to him of the hereditaments thereafter described for the sum of 3,673*l.* 8*s.* 2*d.*; that "it was one of the conditions of the contract that, in addition to the purchase-money, the purchaser should pay for all timber and other trees on the lands agreed to be sold at a valuation, and the same have accordingly been valued at the sum of 1,324*l.* 14*s.* 6*d.*, making with the said sum of 3,673*l.* 8*s.* 2*d.*, the total purchase-money of 4,998*l.* 2*s.* 8*d.*"

The defendant having threatened to enter upon and cut down timber and other trees on that part of Coldhall Lane which abutted on King Wood, the plaintiff commenced this action, claiming (i.) a declaration that the conveyance passed to him not only King Wood but also the adjoining one equal moiety of the soil of Coldhall Lane, including the timber and other trees growing on such half, subject only to lawful rights of way; and (ii.) an injunction to restrain the defendant from cutting or interfering with the timber or other trees growing upon the lane so far as it abutted upon the plaintiff's property.

On 25 November, 1893, ROMER, J., held that the presump-

tion of law that the soil of the lane *usque ad medium filum via* passed by the conveyance was rebutted by the circumstances.

The plaintiff appealed.

Neville, Q.C., and *Begg*, for the appellant :

A moiety of the lane passed by virtue of the presumption of law, which is not rebutted by the circumstances of the case. Evidence of what trees were included in the valuation is not admissible to show what land passed by the deed—which is a pure question of construction ; only the deed itself and the surrounding circumstances are admissible as evidence of what the deed means, and the valuation and the trees included in it are not “surrounding circumstances.” Further, the value of the trees on the lane being only some 12*l.*, is too insignificant a thing, having regard to the total purchase-money being nearly 5,000*l.*, to be allowed to rebut the presumption of law.

[They referred to *Micklethwait v. Newlay Bridge Co.* (2), *Dwyer v. Rich* (3), *Holmes v. Bellingham* (4), *Turner v. Ringwood Highway Board* (5), *Curtis v. Kesteven County Council* (6), *Salisbury (Marquis) v. Great Northern Railway* (7), *Plumstead Board of Works v. British Land Co.* (8), *Leigh v. Jack* (9), and *Deronshire (Duke) v. Pattinson* (10).]

[The COURT referred to *Berridge v. Ward* (1).]

Millar, Q.C., *Hopkinson, Q.C.*, and *Ribton*, for the respondent, were not called upon to argue.

LINDLEY, L.J. : I think this case is very near the line ; still, for the reasons which I will give presently, it appears to me the decision arrived at by Mr. Justice ROMER is right. The question is a very

(2) 33 Ch. D. 133 ; 55 L. T. 336.

(3) 6 Ir. Rep. C. L. 144.

(4) 7 C. B. (N. S.) 329 ; 29 L. J. C. P. 132.

(5) L. R. 9 Eq. 418 ; 21 L. T. 745 ; 18 W. R. 424.

(6) 45 Ch. D. 504 ; 60 L. J. Ch. 103 ; 63 L. T. 543 ; 39 W. R. 199.

(7) 5 C. B. N. S. 174 ; 28 L. J. C. P. 40 ; 7 W. R. 75.

(8) L. R. 10 Q. B. 16 ; 44 L. J. Q. B. 38 ; 31 L. T. 752 ; 23 W. R. 133.

(9) 5 Ex. D. 264 ; 49 L. J. Ex. 220 ; 42 L. T. 463 ; 28 W. R. 452.

(10) 20 Q. B. D. 263 ; 57 L. J. Q. B. 189 ; 58 L. T. 392.

simple one, and it is whether a strip of land, which is part of a highway, has passed by the conveyance of some adjoining land or has not. *Primâ facie* a conveyance of adjoining land would pass the half of the soil of the highway which adjoins the land so conveyed. That point was settled a great many years ago; the leading case on the subject is *Berridge v. Ward* (1), and it is a very strong case. It is quite sufficient for this purpose to read the marginal note, "Where a piece of land which adjoins a highway is conveyed by general words, the presumption of law is that the soil of the highway *usque ad medium filum* passes by the conveyance, even though reference is made to a plan annexed, the measurement and colouring of which would exclude it." The concluding words there, beginning with "even though," are what is most important. That case has been followed since 1861.

The question, of course, in this case is whether there are circumstances sufficient to exclude the presumption. In the first place, it must be borne in mind that it is a rebuttable presumption that a piece of land not described in the conveyance, which, according to the literal construction of the conveyance, excludes it, nevertheless passes by it. It is a curious legal inference, an inference that is capable of being rebutted by circumstances which show that the parties never really intended it.

We have here a conveyance of a piece of land called King Wood, and the recitals in the conveyance are extremely important. The conveyance refers particularly to the Ordnance map, to which I attach considerable importance. The Ordnance map shows King Wood, and it is thereon numbered 77, and the Ordnance map shows the lane in question, and King Wood and the lane have two separate numbers, they are in two separate parishes. It is important that the lane is numbered separately from No. 77, and when you come to a description of the parcels with reference to the Ordnance map and the numbering on that map, the question of the numbers appears to me to be too important to be left out of account.

The recitals recite that the vendor, who is the tenant for life, has agreed to sell to the purchaser, Mr. Pryor, the freehold and copyhold hereditaments hereinafter described, and hereby conveyed and assured, and the inheritance of the said freehold hereditaments in fee simple in possession, and the customary inheritance of the said

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copyhold hereditaments free from incumbrances, for the sum of 3,673*l.* 8*s.* 2*d.* Then comes a recital which is very important:

‘And whereas it was one of the conditions of the contract that, in addition to the purchase-money, the purchaser should pay for all timber and other trees on the lands agreed to be sold at a valuation, and the same have accordingly been valued at the sum of 1,324*l.* 14*s.* 6*d.*, making the whole purchase-money 4,998*l.* 2*s.* 8*d.*’ Therefore we have here a statement made by these two gentlemen that the timber on the land agreed to be sold has been valued at a certain sum. Now we know as a fact that the trees which were so valued did not include some thirty or forty trees which are upon the strip of land in question. That is an admitted fact. It is said that fact is not admissible in evidence. I cannot understand how, in the face of a recital like this, we are not entitled to know what trees have been valued in that sum. What we have to address our minds to appears to be whether this presumption is or is not rebutted, therefore this evidence is of the utmost importance, and clearly admissible.

Now we come to the operative part, which is this: As to all those woodlands known as King and Chapel Woods, comprising as to Bearman’s Farm with the copyhold hereditaments hereinafter described, 157·348 acres, measured according to the Ordnance Survey for the parish of Margaretting aforesaid, and comprising as to the said woodlands 52·645 acres, measured according to the said Ordnance Survey, as the said farm lands, hereditaments, and premises are with the copyholds more particularly described in the schedule, and are also delineated on the plan drawn on these presents, the freehold part being edged with a pink line and the copyhold with a blue line. When we turn to the plan we find, as was the case in *Berridge v. Ward* (1), that the pink line, which is the line we have to consider, is so drawn as to all appearance to exclude this strip of land. That, of course, since *Berridge v. Ward* (1), is not conclusive by any means, neither does the acreage coupled with it amount to sufficient to rebut the presumption. When we look at the schedule we find that the woodland is numbered 77 as on the Ordnance plan, but we do not find that other piece which is numbered 5 on the Ordnance plan, or any part of it, in the schedule at all. Therefore, so far as the description in

the parcels goes, we cannot find this little bit of land which is in dispute specified either in the schedule or in the plan. Still that, I say, is not enough to exclude the presumption. But when we come to look at the matter of the trees and the recital, it appears to me that the learned Judge has decided this case rightly. The trees which were valued were the trees on "the lands agreed to be sold," the lands which the parties agreed should be conveyed. We ask what trees are conveyed, and we find they do not include those on this piece of land. One alone of the facts which I have mentioned would not be conclusive to rebut the presumption, but when you join them all together it is difficult to say that this piece of land passed by presumption of law, and that there is not sufficient to rebut the presumption.

I think the decision of Mr. Justice ROMER is right, and that the appeal must be dismissed.

KAY, L.J.: I am of the same opinion. The question is whether or not the presumption that half the lane *ad medium filum* adjoining one side of King Wood passed by the conveyance is rebutted by circumstances which the Court is bound to regard. Those circumstances have been enumerated by Lord Justice LINDLEY. First of all, on the face of the deed the acreage given does not include any part of this road. Secondly, the parcels are described by reference to the Ordnance map, and the numbers on the Ordnance map are copied on the plan which is part of the conveyance; this moiety of the road is included in the Ordnance map in a piece numbered 5, and No. 5 is not referred to in this deed. Thirdly, you find upon the plan that the freehold land, which includes King Wood, is edged with a pink line, which is drawn at the margin of the road, so as also not to include any part of the road.

I agree that those facts alone, after the decision of *Berridge v. Ward* (1), although they are strong and significant, might not be enough to rebut the presumption; but then we have another fact which, added to these facts, to my mind does turn the scale. The presumption is, I think, rebutted by an accumulation of facts, some of which alone, or it may be any of which alone, might not be enough to rebut it, but when you get the force of the whole accumulation, that accumulation seems to me, as the learned Judge has

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held, sufficient to rebut the presumption. The schedule in this deed mentions the wood by the number given on the Ordnance map, and gives the acreage of the wood, not including part of the lane, down to three figures of decimals—that is, to the thousandth part of an acre. Certainly that is very strong to show that part of the lane, the acreage of which would amount to something, is not *prima facie* included in the parcels of this deed. However, notwithstanding all the facts I have enumerated, I think the presumption would still remain un rebutted. But then there is another fact, and upon that fact the question of evidence has been raised.

Before I refer further to the facts, I will read the language of the Court of Appeal in the case of *Devonshire (Duke) v. Pattinson* (10), the judgment in which case was given by Lord Justice FRY, and agreed in by the other members of the Court. The Lord Justice there says (11): “By deed of 21 March, 1846, the Duke conveyed to Messrs. Dixon the Castle Saucery, described as a close, bounded by the River Eden, on or towards the north, and the deed contained the usual general words. The defendants rightly contend that to such a deed as this, containing such a description of a close, there applies the well-known presumption that, although the close is described as bounded by the river, yet that the grant carries with it a moiety of the bed of the river, and they have further contended that this presumption can be repelled only by words in the deed itself. In our opinion, the latter contention cannot be maintained, for we hold that the presumption may equally be rebutted by the circumstances under which the deed was executed.” Then the learned Lord Justice refers to *Beckett v. Leeds Corporation* (12), *Salisbury (Marquis) v. Great Northern Railway* (7), and *Micklethwait v. Newlay Bridge Co.* (2), and then he continues: “The conclusion that you may regard the circumstances under which a deed is executed as rebutting the presumption is only an illustration of a wider principle. ‘In deeds as well as in wills,’ says Lord WENSLEYDALE in *Waterpark v. Fennell* (13), the state of the subject at the time of execution may be inquired into.’” I will not read further, because that

(11) 20 Q. B. D. 273.

(12) L. R. 7 Ch. 421; 26 L. T. 375; 20 W. R. 454.

(13) 7 H. L. C. 684; 7 W. R. 634.

which is further stated, refers to the particular circumstances of that case.

Now I am going to refer to what Lord Justice LINDLEY has already mentioned. In this deed there is a recital, after reciting the general contract for the sale of the freehold and copyhold hereditaments hereinafter described and conveyed, which runs thus: "And whereas it was one of the conditions of the contract that, in addition to the purchase-money, the purchaser should pay for all timber and other trees on the lands agreed to be sold at a valuation, and the same"—that is, the timber and other trees on the land agreed to be sold—"have accordingly been valued at the sum of 1,324*l.* 14*s.* 6*d.*," a very minute valuation going down even to pence, "making with the said sum of 3,673*l.* 8*s.* 2*d.* the total money of 4,998*l.* 2*s.* 8*d.*"

It is said you cannot look to see what trees were included in that valuation. I want to know why not? The words I read from the judgment in the case of *Devonshire (Duke) v. Pattinson* (11) certainly cover the point, and not only was this valuation a circumstance under which the deed was executed, but it is a circumstance referred to on the face of the deed, and, therefore, it seems to me by all the principles of evidence you may and should and must, in order to understand what the deed means, in reference to the subject-matter which it purports to convey, inquire what were the trees which were valued.

During the course of the argument I put an illustration. Suppose the words in the recital had been "the trees valued which are in number 372," or any number you like, is it possible to say that you might not know what those 372 trees were? Lord Justice A. L. SMITH put another illustration, and asked whether, supposing it had been all the trees marked with a cross, it was possible to say that you might not then inquire what trees they were which were marked with a cross. On the face of the deed you have a statement that the trees on the land sold had been valued, and the value brought out to a sixpence, and if you knew what those trees were it would assist you in determining whether the presumption as to the passing of the land *ad medium filum* with the road was rebutted or not, for the fact is that, although upon that land there are growing trees, the value of which is stated to us to be 12*l.*, not one of these trees is included in this valuation.

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It was said in argument that there may have been a mistake in the valuation. But we have no right to presume a mistake. We have to construe the deed, and apply it to the subject-matter to which it refers, and the question is strictly, aye or no, did this land *ad medium filum* pass by this deed? It seems to me that we must treat the matter as though the vendor and purchaser had themselves met and agreed what trees should be valued, and had themselves determined that the trees on this part of the land were not to be valued. And why? The only reason that can be imagined is because this part of the lane was not included in the sale. To my mind that distinguishes this case from *Berridge v. Ward* (1). There is a fact here that did not occur in *Berridge v. Ward* (1), which, coupled with all the other circumstances to which I have referred, seem to me to be enough to rebut the presumption of law that the land *ad medium filum* of the road passed by this deed. I therefore think the decision of Mr. Justice ROMER was right.

A. L. SMITH, L.J.: I am of the same opinion. I must say that, considering that the utmost value that can be put upon this timber is 12*l.*, and that the purchase comprised in this deed of 31 December, 1890, amounted to nearly 5,000*l.*—this is a lamentable dispute upon such a small matter. I must, however, deal with the case as best I can according to law. I maintain the proposition which the appellant's counsel disputed, that if everything in the deed is looked at, Mr. Pryor, the appellant, cannot make out that he purchased this *locus in quo*. If you look at the deed alone, it is shown by the plan and by the acreage referred to in the deed that this land is not included, and therefore if the deed alone is looked at, and nothing more, in my judgment the appellant could not prove his case. But he is entitled to go further, and to say that if the deed is looked at it is found that there is a lane running on the north side of King Wood—it does not matter whether it is a highway or an occupation way—and, therefore, according to the presumption of law which has now been long settled, and is passed recall, the presumption is that, when King Wood was conveyed to Mr. Pryor, he had conveyed to him *primâ facie* the land up to the middle of the lane.

But that presumption is a rebuttable presumption, as all presumptions are, and if it can be shown from the circumstances attending the execution of the conveyance, and the circumstances existing at the time the conveyance was executed, that that *primâ facie* presumption is rebutted, then those circumstances are admissible to show that this piece of land was not included in the deed itself, and is not conveyed by it.

It was contended for the appellant that the circumstance about these trees was not legal evidence in this case. I do not agree with that contention. The passage read by Lord Justice KAY from the judgment delivered by Lord Justice FRY in *Devonshire (Duke) v. Pattinson* (10) sets that point at rest, and I will simply read what I believe to be a short *résumé* of the law from the judgment of Lord Justice LOPES in *Micklethwait v. Newlay Bridge Co.* (2), summing up in the shortest and clearest possible manner what I believe to be the law on this subject. The Lord Justice says: "It appears to me that the result of the authorities is this, that if land adjoining a high way or a river is granted, the half of the road or the half of the river is presumed to pass, unless there is something either in the language of the deed, or in the nature of the subject-matter of the grant, or in the surrounding circumstances, sufficient to rebut that presumption." Now what is there here to rebut the presumption? There is a recital in the deed that, prior to its execution, the trees upon the land which was to be conveyed by the deed were of the value of 1,324*l.* 14*s.* 6*d.*, and when the facts are ascertained, and it is found that not one of the trees on the land in dispute was taken into that valuation, which seems to me to be legitimate evidence for the purpose of showing whether the *primâ facie* presumption is rebutted or not. Supposing just before signing the deed the vendor walked the bounds, and walked along the north side of the wood, and recited that in the deed, that would negative the presumption. I do not think it would have been necessary to recite it in the deed, because proof would have to be given, when it came to a question of parcel or no parcel, as to what had in reality been done. I can see no difference between the marking of trees and valuing them, as has been done in this case. Therefore, I come to the conclusion that this evidence is admissible, and, applying it to the ordinary pre-

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sumption that arises, in my judgment that presumption is rebutted, as Mr. Justice ROMER held.

On these grounds I am of opinion that this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Duffield & Bruty*, for the Appellant.

A. G. Maskell, for *Maskell & Arthy*, Chelmsford, for the Respondent.

IN RE FISH, INGHAM v. RAYNER.

1894, March 1. LINDLEY, KAY AND A. L. SMITH, L.JJ.

Will—Construction—“My Niece E.W.”—Wife’s Grandniece—Legitimacy.

Where a testator gives the residue of his property in favour of “my niece E. W.,” having no niece of that name, his wife having two grandnieces E. W., one of whom is illegitimate, evidence is not admissible to show that the illegitimate grandniece was designated.

APPEAL from the Vice-Chancellor of the Chancery of the County Palatine of Lancaster.

By his will, dated 12 January, 1884, George Fish devised and bequeathed all his real estate and the residue of his personal estate to his executors and trustees thereinbefore appointed, upon trust to convert the same into money, and out of the proceeds, after payment as therein mentioned, to invest the residue of the money, and to pay the interest, dividends and proceeds thereof to his wife for life, and after her decease to stand possessed of the trust moneys or securities for the same upon trust, after paying certain legacies as therein mentioned, to pay the interest, dividends, and income thereof to “my niece Eliza Waterhouse” during her life.

The testator died on 2 June, 1884, without having revoked or altered his will, which was proved on 4 November following by the executors named.

The estate was duly converted and invested as directed by the will. The testator’s widow died on 19 March, 1893. The testator had no niece Eliza Waterhouse, either of his own or on his

wife's side, but on his wife's side he had two grandnieces of that name, one of whom was legitimate and the other illegitimate. The illegitimate grandniece had been on terms of close intimacy with the testator, who had been accustomed on occasions to speak of her as his niece; she had since the date of the will married John Rayner.

The surviving executor-trustee presented a petition praying a declaration whether Mrs. Rayner or the legitimate grandniece, Eliza Waterhouse, was entitled to the income of the ultimate residue of the testator's estate.

On 8 November, 1898, the Vice-Chancellor held that Eliza Waterhouse was entitled.

Mrs. Rayner appealed.

Upjohn, for the appellant :

There is no person answering the description "my niece Eliza Waterhouse;" as a matter of pedigree, therefore, there is an ambiguity, and evidence is admissible to show who is really meant: *In the goods of Ashton* (1). The testator was in the habit of speaking of the appellant as his niece, and the Court has a right to ascertain all the facts and thus to put itself in the testator's position, to ascertain the bearing of the language he has employed: per Lord CAIRNS in *Charter v. Charter* (2).

[KAY, L.J.: By admitting evidence to show that the testator called the wife's illegitimate grandniece his niece, you are trying to give evidence of the testator's intention.]

[He also referred to *Dorin v. Dorin* (3), *Doe d. Hiscocks v. Hiscocks* (4), *Sherratt v. Mountford* (5), per MELLISH, L.J., and *Grant v. Grant* (6).]

Macnaghten, for Eliza Waterhouse :

Once admit, as you must, that "niece" means "legitimate

(1) [1892] P. 83; 61 L. J. P. 85; 67 L. T. 325.

(2) L. R. 7 H. L. 364, 377; 43 L. J. P. 73, 80.

(3) L. R. 7 H. L. 568; 45 L. J. Ch. 652; 33 L. T. 281; 23 W. R. 570.

(4) Tud. L. C. 3rd edit. p. 918; 5 M. & W. 363.

(5) L. R. 8 Ch. 928; 42 L. J. Ch. 688; 29 L. T. 284; 21 W. R. 818.

(6) L. R. 5 C. P. 727; 39 L. J. C. P. 272; 22 L. T. 829; 18 W. R. 951.
See S. C., L. R. 2 P. 8; 39 L. J. P. 17; 21 L. T. 645; 18 W. R. 230.

"niece," and the case is at an end, for it is not disputed that "niece" may mean a wife's niece or grandniece. The appellant's contention really would have you cut out the words "my niece" altogether. *Dorin v. Dorin* (3) concludes this case; *Charter v. Charter* (2) was a very peculiar case; *Grant v. Grant* (6) has been twice disapproved: *Wells v. Wells* (7), *In re Taylor, Cloak v. Hammond* (8); but, if it be taken in its fulness, the legitimate grandniece is more really the testator's niece than the illegitimate grandniece.

T. E. Mansfield, for the surviving trustee.

Uppjohn, in reply:

Dorin v. Dorin (3) only says you are to read "legitimate" into the case of a class which is capable of being enlarged.

LINDLEY, L.J.: This is one of those painful cases in which the result may be that the intention of the testator is defeated. But it seems to me that the rule of law which is applicable here is too strong for the appellant, and I think that the Vice-Chancellor was right in the conclusion at which he arrived.

When you look at the will you find that the testator gives the residue of his property in trust for "my niece Eliza Waterhouse." You ask, who answers that description? And you find there is no one who accurately answers it; the testator has no niece of his own of that name. Then you look farther, and find that the testator's wife has two grandnieces, both called by that name, one of whom was legitimate and the other illegitimate. The legitimate grandniece of the wife answers the description in the will more nearly than the other; can you then admit evidence in favour of the other? The principle applicable to this case cannot, I think, be more satisfactorily stated than it is in the judgment of Lord Justice MELLISH in *Sherratt v. Mountford* (5). There the Lord Justice says: "No doubt a man's own nephews and nieces are primarily his nephews and nieces, but I am of opinion that his wife's nephews and nieces

(7) L. R. 18 Eq. 504; 43 L. J. Ch. 681; 31 L. T. 16; 22 W. R. 893.

(8) 34 Ch. D. 255; 56 L. J. Ch. 171; 55 L. T. 649; 35 W. R. 186.

are his nephews and nieces according to the ordinary meaning of the words in a secondary sense; so that if he has no nephews and nieces according to the strict primary sense, then his wife's nephews and nieces will take under the description of his nephews and nieces, unless there is some other class of persons who come into competition with them, and who are proved by extrinsic evidence first to be persons who may take under the description of nephews and nieces, and if that is proved, then that they are persons who really were intended to take. But I am of opinion that, if there is no such class, if no one claims under the description of his nephews and nieces, except his wife's nephews and nieces, that then his wife's nephews and nieces will take rather than that the gift should fail." Now who can take in the circumstances of the case before us? The legitimate grandniece of the wife can, and I do not think evidence is admissible in favour of the illegitimate grandniece in competition with her. The appeal must therefore be dismissed.

KAY, L.J.: I have come to the same conclusion. The testator had no niece Eliza Waterhouse of his own, nor had his wife any such niece in the strict sense of the word "niece," but she had two grandnieces of the name, one of whom was legitimate and the other illegitimate, and it is now attempted to get in evidence on behalf of the illegitimate grandniece to show what was the intention of the testator, and it is ingeniously said that there is a latent ambiguity in the will. It is also said that it is not sought to give evidence of the testator's intention, but of surrounding circumstances. How can there be any question here of surrounding circumstances? It is not a surrounding circumstance that a testator was accustomed to call a person by an appellation which was not applicable to that person; evidence of that is evidence of intention.

Does it make any difference in the present case that the testator had no niece, and that it is only a question of the wife's grandniece?

It is sought to oust the wife's legitimate grandniece by introducing some one who is illegitimate, but the law always prefers legitimacy as against illegitimacy, and will not allow evidence such as is here sought to be brought in on behalf of illegitimacy. I refer to the

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cases of *Hill v. Crook* (9) and *Dorin v. Dorin* (3). I think the decision of the Vice-Chancellor was right.

A. L. SMITH, L.J.: I have arrived at the conclusion that the evidence sought to be brought in in favour of the illegitimate grand-niece of the wife is not admissible. It seems to me we are bound by authority in this case, though, if I could, I should have been inclined to hold differently from what I do.

The testator speaks of "my niece Eliza Waterhouse." He had no niece Eliza Waterhouse. But his wife had a legitimate grand-niece and also an illegitimate grandniece, both of that name. Who, under these circumstances takes? It is sought to give evidence that the testator meant the illegitimate grandniece to take. But the rule of law seems inflexible against that. *Primâ facie*, a gift to "my niece Eliza Waterhouse" means "my legitimate niece Eliza Waterhouse"; then, there being no such legitimate niece and there being two grandnieces of the wife, one legitimate and the other illegitimate who come into competition, it must, according to the authorities, mean the legitimate grandniece of the name. There is no latent ambiguity here; if both the grandnieces were legitimate there would be an ambiguity. But that is not the case. I think the evidence is inadmissible, and that the appeal must be dismissed.

Appeal dismissed.

Solicitors: *T. H. Philpots*, for *E. Rennison*, Blackburn; *Pritchard, Englefield & Co.*, for *E. D. Little*, Blackburn, and *J. W. Shaw*, Blackburn.

(9) L. R. 6 H. L. 265; 42 L. J. Ch. 702; 22 W. R. 137.

IN RE FARBENFABRIKEN'S TRADE-MARK.

1894, Jan. 22; Feb. 8. LINDLEY, KAY AND A. L. SMITH, L.JJ.

Trade-mark — Registration — Essential Particulars — “Somatose” — “Invented word” — “Word having no reference to character or quality of goods” — Patents, Designs, and Trade-marks Act, 1883 (46 & 47 Vict. c. 57), s. 4; Patents, Designs, and Trade-marks Act, 1888 (51 & 52 Vict. c. 50), s. 10, subs. 1 (d), (e).

Upon an application to register the word “Somatose” as a trade-mark in respect of an article made from meats and called a pharmaceutical product, its object being nourishment of the human body:—

Held (LINDLEY, L.J., *dissentiente*), that “Somatose” was not an “invented word,” but that, even if it was an invented word, it was not a “word having no reference to the character or quality of the goods” within section 64 of the Patents, &c. Act, 1883, as amended by section 10, of the Patents, &c. Act, 1888, and consequently could not be registered.

APPEAL from a decision of North, J.

The above-named company, which was a trading concern carrying on business at Elberfeld, in Germany, applied to register the word “Somatose” as a trade-mark, No. 171,457, for goods in class 3, in respect of an article which was made from meat and called a pharmaceutical production. The article was described as “a yellow tasteless and odourless powder,” its principal constituents being said to be primary albumoses, and its object was nourishment of the human body. The comptroller objected to register the word on the ground that it had reference to the character or quality of the goods in respect of which registration was sought, and NORTH, J., on 24 November, 1893, affirmed his refusal. The applicants appealed. On the hearing of the appeal it was admitted that the word was derived from the Greek word “Soma,” meaning a “body.”

A. R. Kirby, for the appellants, contended that “Somatose” was an invented word, and that it was in no way descriptive of the article, and consequently was capable of registration.

He relied on *In re Burgoyne's Trade-mark* (1).

Sir J. Rigby, S.-G., and Ingle Joyce, for the comptroller-general, the respondent, submitted that the word in question was not an invented word, and that, even if it were, it had reference to the character and quality of the article, and therefore, being descriptive, it could be registered: *In re Meyerstein's Trade-mark* (2).

Cur. adv. vult.

February 8.

LINDLEY, L.J.: By section 10 of the Patents, Designs, and Trade-marks Act, 1888, it is enacted that for section 64 of the principal Act the following section shall be substituted: "64 (1). For the purposes of this Act a trade-mark must consist of or contain at least one of the following essential particulars." [His Lordship read clauses (a), (b), (c), (d), and (e), and continued:] It does not follow that every trade-mark which does contain one at least of those particulars is a trade-mark for the purposes of the Act—i.e. a trade-mark which the comptroller ought to register. It is, therefore, necessary to ascertain what kind of trade-mark which does contain one of the statutory essentials is not a trade-mark for the purposes of the Act—i.e. is one which ought not to be registered. Clause (e) by its negative form excludes certain words; and, if a trade-mark consists of one word only, and that word is such as is described by clause (e), that word cannot be properly registered as a trade-mark. I will return to clause (e) presently. But in addition to this clause, sections 70, 72, and 73 of the Act of 1888 exclude certain words from registration as trade-marks. These sections, and the discretion given by section 62, subsection 4 of the Act of 1888 to the comptroller to refuse to register a trade-mark, would clearly justify the rejection of any trade-mark, even if it contains one of the statutory requisites, if such mark be of an indecent or libellous character, or if it infringes the right of some other person, or if it is identical with or so similar to one already registered as to be calculated to deceive. But I can find no other restriction, and if a person seeks to register a trade-mark which is open to none of these objections, and which does contain one of the essentials mentioned in section 10 of the Act of 1888, I am aware of no legal principle which would justify the Court in refusing to direct its registration.

The discretion given to the comptroller is subject to appeal to the Board of Trade (section 62, subsection 4 of the Act of 1883), and, the Board of Trade having remitted the appeal to the Court under section 62, subsection 5 of the same Act, the Court must decide the question in accordance with legal principles, and cannot properly decline to review the decision of the comptroller.

The word sought to be registered is "Somatose," and it is sought to be registered in respect of a substance falling within class 3, the substance being a preparation from meat and alleged to be nutritious and very digestible. The word is not objected to on any of the grounds mentioned in sections 70, 72, 73 of the Act of 1883, but it is said not to fall within section 10 of the Act of 1888. Two reasons are given for this contention: (i.) It is said that "Somatose" is not an invented word within the meaning of (d). (ii.) It is said to have some reference to the character or quality of the goods and so to be excluded by (e). Each of these reasons must be examined in turn.

There is no statutory definition or description of an "invented word," and I cannot myself see any legitimate ground for limiting its ordinary meaning. Any word which is in fact new, and not what may be called a colourable imitation of an existing word, is, in my opinion, an "invented word" within the meaning of the statute under consideration. It is true that several persons may independently hit upon the same word, but a word already invented and known would hardly be called an invented word because somebody afterwards happened to hit upon it himself. Novelty is, I think, an ingredient in a lawyer's idea of invention.

Again, I do not think that a word can fairly be called an invented word if it is so nearly like a known word in spelling or sound as to be an obvious imitation of it, and is in substance that word though spelt or sounded a little differently. But I am unable myself to see that any other restriction can properly be put on the expression "invented word" in this Act of Parliament. Why in 1888 Parliament substituted the expression "invented word or words" for the expression "fancy word or words not in common use," which was the expression used in the Act of 1883, I cannot ascertain from the statute itself. I can, therefore, only infer that the former expression as construed by the Courts was considered

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unsatisfactory, and that one object, at all events, was to change the expression so as to render the previous decisions on the old expression inapplicable in future. In my opinion, "Somatose" is an invented word within the meaning of the new enactment. It is proved to be new and to have been invented for the purpose of being used as a trade-mark. It is true that the syllables of which it is compounded are well known and are even in common use amongst chemists and medical men. But a new word of more than one syllable may be an invented word, although all the syllables composing it are known and are in use. The only doubt which I have on this part of the case is that "somatos" is the genitive case of "soma," and is as well known as "soma" itself, and "Somatose" is very like "somatos." It is, in fact, composed of the same letters with the addition of an "e." But the words are after all different, and the evidence shows that "Somatose" was not in fact arrived at by adding "e" to "somatos," but by adding the English or Anglicized termination "ose" to "somat." Under these circumstances, "Somatose" may be fairly considered as an invented word. We were pressed by the *Solicitor-General* to put a more restricted construction on the expression "invented word or words" on the ground of inconvenience. He urged that if "Somatose" were registered, the comptroller would have to register such words as "breadose," "butterose," &c., which showed no inventive ingenuity, and the register would be crowded with ridiculous words, which would be intolerable. This, however, is a matter for the Legislature and not for the Court to consider. Inventive ingenuity appears to me not to enter into consideration. Trade-marks are not like patents, intended as rewards to inventors. Their main object is wholly different, and is to prevent one person from passing off his goods as those of somebody else. The Legislature in passing the Trade-marks Acts has also had for one of its objects the exclusion of inconvenient monopolies in words which are already, as it were, common property. If a person selects as a trade-mark for his goods a word which no one has ever heard of before, no injury is done to any one simply because he is prevented from taking the same word to designate his goods. The inconvenience, moreover, is not so great as represented. No one would

care to register as a trade-mark a new word which would not be likely to attract customers and be remembered. A good catch-word is what is wanted, and this practically limits the choice of new words for trade-marks. The choice is still further very materially limited by the prohibition contained in section 10 (e).

This leads me to the second objection—viz. that “Somatose” has reference to the character or quality of the goods. I cannot myself, however, see that this is so. What character or quality of the goods does the word refer to? I am wholly unable to answer this question. The utmost that can be said is that “Somatose” refers in some way to some kind of body. Moreover, I do not believe that this objection would have occurred to any one if it had not been suggested by some statements made by the applicants themselves and laid before the comptroller. But the document containing these statements does not, in my opinion, support the objection. It in fact contains a protest against the inference now sought to be drawn from it. I, however, agree with the contention of the *Solicitor-General* that, according to the true construction of section 10 of the Act of 1888, if a trade-mark consists of only one word, and this is an invented word, so as to come within section 10 (d), but it is also a word having reference to the character or quality of goods, so as to come within section 10 (e), the word cannot be properly registered as a trade-mark. The case supposed would stand thus. A trade-mark must consist of or contain an invented word or something else; but it must not consist of a word which has reference to the character or quality of the goods. If, therefore, an invented word has such reference it falls within the prohibition. This point has already been decided in *In re Meyerstein's Trade-mark* (2), and on this point I think that decision right, although I should myself have said that “Satinine,” the word there, was an invented word. I am of opinion that “Somatose” is an invented word not having reference to the character or quality of the goods, and is free from objection and ought to be registered.

KAY, L.J.: A German trading concern called Farbenfabriken applied to register the word “Somatose” in class 3 in respect of a pharmaceutical product. The comptroller objected “that somatose

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has reference to the character or quality of the goods in respect of which registration is sought." This is denied; and secondly, it is argued that, even if it were so, the word is an invented word to which such an objection does not apply. Mr. Justice NORTH sustained the objection, and this is an appeal from his decision.

"Somatose" is a name given to a yellowish powder which is described by the applicants as "a preparation made out of meat which solely contains ingredients of the same and which can easily be absorbed and taken up into the human body. The object of the somatose is that it can be taken in all such cases in which meat and albuminous bodies are to be prescribed, but which cannot be given in the ordinary solid form, and further, that it can be taken in such cases where particular nourishment is required through the addition of soluble albuminous nourishment." The words "soma" and "somatic" occur in some English dictionaries. They are words derived from the Greek "soma," which means the body, or, applied to animals, the carcass of an animal, and the English words mean the body or carcass and relating to the body or carcass respectively. The Greek word makes "somatos" in the genitive. "Somatose," then, is body or carcass with the addition "ose." This suffix is common, as in the words "comatose," "glucose," "cellulose," and many others. "Comatose" is the condition of coma; "glucose" and "cellulose" are certain preparations derived from the substances indicated in the earlier part of the words. Following this analogy, "Somatose" would mean a preparation of meat or of the carcass of an animal.

Section 64 of the Trade-marks Act of 1888 allowed the registration of "a fancy word or words not in common use." The constant attempts to register words as fancy words which were not really so led to a great deal of litigation, in which various views were adopted; some Judges considering that a fanciful use of a known word might bring it within the description; some Judges inclining to the view that a fancy word must be a word having no meaning, all concurring that a descriptive word ought not to be registered. The Act of 1888 substituted a new definition. Instead of "fancy word or words not in common use" the new Act has "(d) an invented word or invented words; or (e) a word or words having

no reference to the character or quality of the goods and not being a geographical name." This last provision certainly restricts still further the right of registration. "Having no reference to the character or quality of the goods" is more restrictive than the words "descriptive of the goods," which the course of decision had prohibited. But it is argued that this only applies to known words, and being coupled with the former sentence by the disjunctive "or" an invented word may be descriptive though a known word may not. To this I think there are two answers, either of which is conclusive. If the word is descriptive it cannot be an invented word within the meaning of clause (d); and, secondly, the collocation of these two clauses proves to my mind that invented words mean words that have no meaning. I agree with the argument of the *Solicitor-General* that, when the statutes of 1883 and 1888 are compared, the alteration of section 64 was by no means intended to give persons desiring to register a larger right to monopolize words than they had under the former Act and the decisions upon it, but rather if anything to restrict that right still further, and to render the duty of the comptroller more simple and easy. The point came before me in *In re Meyerstein's Trade-mark* (2), when I refused to allow registration of the word "Satinine" for starch, saying, "This is a word which describes the quality of the goods; and there is extremely little invention in the matter, for the only invention is putting at the end of a common word 'satin'—which brings to every man's mind in a moment the notion of a glossy surface—the common conclusion 'ine,' which one finds in 'saline,' 'saccharine,' and numerous other English words. Certainly, if that is inventing a word, it is the easiest mode of invention one can possibly conceive. But I understand this Act of 1888 to be subject to the limitations which the decisions have put on the former Act—that you cannot possibly use any word, fancy word or otherwise, if it is a descriptive word." During the argument in the present case I put the question whether the last sentence did not go too far. Upon consideration I do not think it does. It cannot be the meaning of the Act of 1888 that, although by subsection (e) there is a prohibition against registering words having a reference to the character or quality of the goods, that may be evaded by compounding a word descriptive of the

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goods and treating it as an invented word under subsection (d). In my opinion, Mr. Justice NORTH rightly refused to allow this word to be registered, and I think this appeal should be dismissed.

A. L. SMITH, L.J.: By section 64 of the Patents, Designs, and Trade-marks Act, 1888, so far as is material to the present case, it was enacted that for the purposes of the Act a trade-mark might consist of "a fancy word or words not in common use." This enactment gave rise to considerable litigation, and the Legislature, for the purpose of terminating the controversies which had been going on for some five years over this phrase, by the Patents, Designs, and Trade-marks Act, 1888, enacted as follows: "For section 64 of the principal Act—*i.e.* the Act of 1888'—the following section shall be substituted, namely, 64 (1). For the purposes of this Act a trade-mark must consist of or contain at least one of the following essential particulars"—(a), (b) and (c) are immaterial to this case. Then "(d) an invented word or invented words; or (e) a word or words having no reference to the character or quality of the goods, and not being a geographical name."

The question is, what is the true interpretation of subdivisions (d) and (e) of this new first subsection of section 64? It will be seen that the phrase "a fancy word or words not in common use" is discarded. It appears to me that one thing is clear, namely, that the Legislature intended that whatever words were thereafter to be registered, when they fell within (d) or (e), they should be words which had no reference to the character or quality of the goods of the trader. It is impossible, I think, to hold that the Legislature intended that an "invented word" might be a word having reference to the character or quality of the goods, whether a non-invented word or not. There would be no sense in so holding; and it would not be the true construction of the Act.

Now to constitute an "invented word" within the meaning of the section, in my judgment it must be a word coined for the first time. Such a word of necessity is incapable of having reference to the character or quality of goods; because, *ex hypothesi*, it is an entirely new unknown word incapable of conveying anything. That, in my opinion, is why it became unnecessary to repeat the

limitation in reference to goods in (*d*) whereas it was necessary to repeat it in (*e*). Suppose a trader to go to a dictionary and to find a word wholly unused, and to propose to register the word, would that be an invented word within the section? I say it would not, because the word so found would not be a word coined for the first time; and it, therefore, might be capable of having reference to the character or quality of goods. Suppose the trader therein to find two words equally unused and to join them together, will that suffice? I think not; and for the same reason, namely, that the two which were joined together not being words coined for the first time might when joined have reference to the character and quality of goods, whereas I think that the essence of an invented word within the meaning of the section is that it is a word which of necessity is incapable of having any reference to goods inasmuch as it is incapable of conveying anything.

Now, whatever the word "Somatose," which is sought to be registered by the applicants, I find in Webster's Dictionary the word "Soma, from Greek—soma, somatos, the body." Also the word "Somatic, of or pertaining to the body as a whole." In Johnson's Dictionary there is the word "Somatic, from Greek *σῶμα, σῶματος*, the body." In Todd's Dictionary will be found the word "Somatic; corporeal, belonging to the body." In the Imperial Dictionary there are the words "Somatic, somatical; corporeal, pertaining to the body." Now, apparently, what the applicant has done is to take the well-known word "soma" and add thereto the not unknown adjunct "tose"—for instance, as in "Coma, Comatose;" or they have taken the word "Somatos" and added the letter "e," and it is said on their behalf that they have invented a word within the meaning of the section. In my opinion they have not, for the word "Somatose" cannot be said to be a word coined for the first time, and consequently it is not a word which is of necessity incapable of having reference to the character or quality of goods. The meaning conveyed by the words "*σῶμα, σῶματος*" was well known before, and, in my judgment, "Somatose," for the reason above, is not an invented word within the section.

I now come to the next point under subdivision (*e*), which is this: has the word "Somatose" no reference to the character or

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quality of the applicants' goods? I find in a copy of the remarks made by the applicants, which was forwarded] by their solicitors to the Comptroller-General, that the applicants describe the object to be obtained by the use of Somatose, which is a powder, and the ingredients out of which it is made. They say: "The object of Somatose is that it can be taken in all cases in which meat and albuminous bodies are to be prescribed, but which cannot be given in ordinary solid form," &c. It goes on further, but that is sufficient. They describe its ingredients in this way: "Somatose is a preparation made out of meat, which solely contains ingredients of the same, and which can easily be absorbed and taken up into the human body." To state it shortly, they describe their goods, which they call Somatose, as being made out of meat, which may easily be absorbed into the human body.

In these circumstances I cannot bring myself to hold that the word "Somatose," mainly composed of the words "σῶμα" or "σώματος," which means the body or of the body, has no reference to the character or quality of the body. This was the conclusion Mr. Justice NORTH arrived at, and I think he was right. Lord Justice LINDLEY not agreeing with me of necessity makes me doubt the accuracy of my judgment, and I am glad that Lord Justice KAY has arrived at the same conclusion that I have.

I think that this appeal, for the reasons above, must be dismissed.

Appeal dismissed.

Solicitors: *Ashurst, Morris, Crisp & Co.*, for the Appellant.

The Solicitor to the Board of Trade, for the Comptroller-General.



IN RE GASQUOINE (DECEASED), GASQUOINE v.
GASQUOINE.

1894, January 24. LINDLEY, KAY AND A. L. SMITH, L.JJ.

Executor—Trustee—Misappropriation—Liability of Co-trustee.

Two executors and trustees who, *bond fide* and without reason for suspicion, act according to the usual course of business, and put it into the power of a third (whom they properly employ as a stockbroker in the trust) to unregister certain bonds which he then misappropriates, are not liable for his defalcations.

APPEAL from Kekewich, J.

By his will, dated 6 December, 1889, Robert Gasquaine appointed his wife and George James and George Croft Chamberlain executors and trustees, and, after giving certain pecuniary and specific legacies, bequeathed to his trustees a sum of 8,000*l.* upon trust for his wife for life, and after her death for his three children in equal shares; and the testator devised and bequeathed all the residue of his real and personal estate, subject to payment of his funeral and testamentary expenses and debts and legacies, to his trustees upon trust for his three children in equal shares.

The testator declared that James and Chamberlain, who themselves were stockbrokers, or any future trustee who might be a stock and share broker, should be entitled to charge for all business done by him in relation to the estate in the same manner as if he had not himself been an executor or trustee, but had been employed by the executors and trustees to do such business as their stockbroker.

The testator died on 28 June, 1890, and his will was duly proved by the three executors named therein.

The testator's property consisted partly of bonds (which were registered) of the Grand Trunk Junction Railway Company, the Erie Railway Company, and other American railways, not authorized by the investment clause contained in the will.

James acted for the executors as stockbroker in regard to the sale of these bonds. His co-executrix and co-executor, having no reason to suspect his honesty, put it in his power to unregister the

bonds and make them payable "to bearer," and thus to get them into his own hands. James paid a large sum arising from the sale of the bonds into the account of the executors, but retained and misappropriated a sum of some 8,000*l.* or 9,000*l.*

In or about May, 1891, James absconded, and, his defalcations being discovered, the testator's children commenced this action against the executors and trustees, seeking to make them liable.

There was evidence that it was in accordance with the usual course of business, in dealing with bonds such as those in question, to proceed by way of unregistering them and converting them into "bearer" bonds.

KEKEWICH, J., held that the defendants, Mrs. Gasquoine and Chamberlain, were not liable.

The plaintiffs appealed.

Renshaw, Q.C., and Yate Lee, for the appellants :

The co-executors are liable for the misappropriation by James. It is immaterial whether they are to be treated as co-executors or co-trustees, but inasmuch as in dealing with these bonds there were two ways, one a safe way, by transferring them as registered bonds, and the other an unsafe way, by unregistering them, and they chose the unsafe way, and by doing so enabled James to commit the fraud, they are liable.

[KAY, L.J., referred to *Candler v. Tillett* (1), *Townsend v. Barber* (2), and *Clough v. Bond* (3).]

It was neither necessary nor in accordance with the usual course of business to unregister the bonds and make them payable "to bearer" before the settling-day. Though a trustee may be safe in merely permitting his co-trustee to receive money in the first instance, he is liable if—as the respondents did here—he leaves it in the control of the co-trustee longer than is reasonably necessary: *Mendes v. Guedella* (4), Lewin on Trusts, 9th edit., pp. 281, 282.

(1) 22 Beav. 257; 25 L. J. Ch. 505; 4 W. R. 160.

(2) 1 Dickens, 356.

(3) 3 My. & Cr. 490; 8 L. J. Ch. 51.

(4) 2 J. & H. 259; 31 L. J. Ch. 561; 6 L. T. 746; 10 W. R. 482.

Warmington, Q.C., and *R. N. Arkle*, for the respondents, were not called upon.

LINDLEY, L.J.: This case is one of those unfortunate cases in which one of several trustees has been fraudulent. The co-trustees have not been guilty of any fraud, and the Court is naturally slow to make an innocent person liable. The testator evidently trusted these trustees. The bonds were American railway bonds, registered in the testator's name, and payable "to bearer." The executor trustees sent in the probate of their testator's will to the company's office, showing their title to deal with the bonds. There are more ways than one of transferring securities such as these. One was for the trustees to have the bonds transferred as registered bonds; and the other, which is said to be the proper way, was to have them made payable to bearer by unregistering them. The course taken in this particular case was the last one I have mentioned. James wrote to Mrs. Gasquoine, who, in accordance with his request, signed a slip to enable the bonds to be unregistered, and Mr. Chamberlain did so too.

Similar proceedings were taken as to the other bonds. The result was that the bonds were converted into bonds "to bearer." How the bonds were got out of the safe and turned into "bearer" bonds is a little uncertain, but that they were got out somehow is evident, and James misappropriated them.

It is said that the co-trustees are responsible for all the misappropriated funds because they unnecessarily trusted their co-trustee with the power to misappropriate them.

The whole question which we have to determine turns on what is the meaning of "necessary." We all know the leading case of *Clough v. Bond* (3), where the authorities are discussed and dealt with, and they are referred to in *Williams on Executors*, 9th edit. vol. ii. p. 1709. Lord COTTENHAM in that case says: "It will be found to be the result of all the best authorities upon the subject that, although a personal representative, acting strictly within the line of his duty and exercising reasonable care and diligence, will not be responsible for the failure or depreciation of the fund in which any part of the estate may be invested, or for the insolvency or misconduct of any person who may have possessed it, yet if that

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line of duty be not strictly pursued, and any part of the property be invested by such personal representative in funds or upon securities not authorized, or be put within the control of persons who ought not to be entrusted with it and a loss be thereby eventually sustained, such personal representative will be liable to make it good, however unexpected the result, however little likely to arise from the course adopted, and however free such conduct may have been from any improper motive. Thus, if he omit to sell property when it ought to be sold, and it be afterwards lost without any fault of his, he is liable: *Phillips v. Phillips* (5); or if he leave money due upon personal security, which though good at the time afterwards fails: *Powell v. Evans* (6), *Tebbs v. Carpenter* (7). And the case is stronger if he be himself the author of the improper investment, as upon personal security or an unauthorized fund. Thus, he is not liable upon a proper investment in the Three per Cents. for loss occasioned by the fluctuations of that fund: *Peat v. Crane* (8); but he is for the fluctuations of any unauthorized fund: *Hancom v. Allen* (9), *Howe v. Lord Dartmouth* (10). So, when the loss arises from the dishonesty or failure of any one to whom the possession of part of the estate has been entrusted, necessity, which includes the regular course of business in administering the property, will in equity exonerate the personal representative. But if, without such necessity, he be instrumental in giving to the person failing possession of any part of the property, he will be liable, although the person possessing it be a co-executor or co-administrator: *Langford v. Gascoyne* (11), *Shiplbrook (Lord) v. Hinchinbrook (Lord)* (12), *Underwood v. Stevens* (13), and see *Hanbury v. Kirkland* (14).” That is as good law now as when it was first spoken. The question we have to ask ourselves is, Did these co-executors act reasonably in turning these bonds into bonds “to bearer” in the way they did? It seems to me that they did. So far as I see, there is no negligence in that part of the transaction: it is true that, if they had been

(5) Freem. Ch. Ca. 11.

(6) 5 Ves. 839.

(7) 1 Madd. 290.

(8) 2 Dick. 499, n.

(9) 2 Dick. 498.

(10) 7 Ves. 137, 150; 6 R. R. 96.

(11) 11 Ves. 333; 8 R. R. 170.

(12) 11 Ves. 252; 16 *ibid.* 477; 8 R. R. 138.

(13) 1 Mer. 712.

(14) 3 Sim. 265.

suspicious and cautious, they might have acted differently, but it cannot be said by us that they were not justified in acting as they did in turning these bonds into bearer bonds.

But it is said that there was negligence on the part of the co-defendants in not looking more sharply after James. I do not agree to this contention, and I think the decision of Mr. Justice KEKEWICH was correct, and we cannot make these defendants liable for the misconduct of their co-trustee, and the appeal should be dismissed.

KAY, L.J.: I am of the same opinion. The will in this case is simple. The effect of the disposition is to give the property to the testator's children.

At the death of the testator part of his property consisted of securities which were not authorized by the terms of the will. What was the duty of the trustees under the circumstances? Their duty was clear: within one year of the testator's death they should have paid the debts, set apart the sum of 8,000*l.*, and finally handed over the residue to the residuary legatees. The executorship was not, in fact, completed within a year of the testator's death, and I think, accordingly, that the Judge was wrong rather than not in treating these persons as trustees rather than as executors.

Now what is the law applicable to the facts before us? Besides the cases referred to in the judgment of Lord Justice LINDLEY, I would refer to the case of *Townsend v. Barber* (2), where the general rule is stated thus: "Where one executor receives the whole or part of his testator's estate, and pays it over voluntarily and unnecessarily to his co-executor and the same is embezzled; if embezzled or lost, he who so paid it over is answerable." Observe that the emphatic word there is "unnecessarily;" and Lord ROMILLY, in *Candler v. Tillett* (1), states the rule thus: "If one executor does any act which enables his co-executor to obtain sole possession of money belonging to the testator's estate, which but for that act he could not have obtained possession of, and this money is afterwards misapplied, the executor who thus enables his co-executor to obtain possession of the money is liable to make good the loss." There is no exception to be taken to that statement of the rule if you

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introduce the existence of an unnecessary act. The co-trustees are liable if the act is an unnecessary one, but the act must be unnecessary.

In this case the will contains a clause enabling a trustee, who is a stockbroker, to charge for work done by him as a stockbroker, as if he were not an executor or trustee. The testator contemplated that there would be stockbroking business to be done; so far, therefore, there was nothing wrong in allowing a stockbroker, who was one of the trustees, to have the possession of these bonds for the purpose of converting them into money. It might be the best thing for the residuary legatees that these foreign bonds should be realized. What was done was this. The bonds were in the name of the testator. The trustees might have taken one of two courses. What they did was to unregister the bonds and turn them into bonds "to bearer."

As to what is "necessary" or "unnecessary," you find it stated in *Clough v. Bond* (8), in the judgment of Lord COTTENHAM, that "necessity, which includes the regular course of business in administering the property, will, in equity, exonerate the personal representative."

The same thing is stated in *Speight v. Gaunt* (15), where it was held that a trustee is justified in employing a broker and placing moneys in his hands if he follows the usual and regular course of business adopted by ordinary prudent men.

I come to the conclusion, after careful consideration, that these executors—and I prefer to treat them as executors rather than as trustees—in acting in the way they did, in putting the conversion of these bonds into the hands of James, were not acting in an unnecessary way within the meaning of the rule as to unnecessary acts, and therefore I consider they are not liable.

But then it is said that the co-executors were guilty of unreasonable delay in allowing James too long a time to make the conversion without calling him to account, and that they ought to have looked into the case more sharply, for if they had they would have found what James was doing. But Chamberlain did make some inquiries,

and I do not see that he had any reason to be dissatisfied with the answer he received.

I cannot see that the co-executors were guilty of any unreasonable delay. James was selling the bonds from time to time; there was no reason to suppose that he was dealing in any improper way with any which remained unsold. It would be pressing the rule against executors very harshly indeed if we said that there was any fault for which these defendants must be held liable in not acting differently from what they did.

James became bankrupt and absconded within a year of the testator's death. It was then discovered that he had misappropriated the bonds.

I do not think it would be fair treatment of honest trustees to make them liable in a case like the present. I think the appeal fails, and must be dismissed with costs.

A. L. SMITH, L.J.: I entirely agree, and have nothing to add.

Appeal dismissed.

Solicitors: *E. Flux, Leadbitter & Paterson*, for *T. Drake*,
Huddersfield, for the Appellants.

Pritchard, Englefield & Co., for the Respondents.

IN RE GLORY PAPER MILLS CO., DUNSTER'S CASE.

1894, August 9. LINDLEY, LOPES AND DAVEY, L.JJ.

Company—Winding-up—Contributory—Signature of Memorandum of Association by Member of a Firm in his own Name—Subsequent Application in Firm Name for same Number of Shares—Intention of Parties—Shares held by Director jointly with another Person, whether sufficient Qualification.

Where a member of a firm signs the memorandum of association of a company in his own name for a certain number of shares, and afterwards applies in the firm name for the same number, it is in each case a question of fact whether there are two contracts to take shares, or only one; and if it is shown that according to the intention of the parties there was only one contract, and that a contract by or on behalf of the firm, the individual signatory to the memorandum cannot be placed on the list of contributories in respect of a separate application by him.

A director's qualification shares may be held by him jointly with another person.

APPEAL from Vaughan Williams, J.

Prior to the incorporation of the Glory Paper Mills Co., Limited, it was informally arranged that the firm of Dunster & Wakefield, paper agents, of which Thomas May Dunster was a member, should become agents for the company when formed. The firm accordingly promoted the company, and Dunster proposed to sign the memorandum of association in the firm name. Being told, however, that the Registrar of Joint Stock Companies objected to the memorandum being subscribed by a firm, he signed it in his own name for 100 shares of 10*l.* each. On 2 May, 1887, the company was incorporated, and Dunster & Wakefield were formally appointed agents. On 17 May, 1887, Dunster sent to the company an application for 100 shares, signed by him in the firm name. These shares were allotted to and paid for by the firm, and were registered in the firm name. By art. 29 of the company's articles the company had "a first and paramount lien" upon shares registered in the name of any member, "whether solely or jointly with others," for his debts, liabilities, and engagements to the company. By art. 73 a director's qualification was the holding of 100 shares of 10*l.* each.

On 8 March, 1894, a winding-up order was made against the company. The official receiver, acting as liquidator, having put

Dunster's name on the list of contributories for 100 shares in addition to those standing in the name of the firm, Dunster took out a summons to have his name removed in respect of such 100 shares. There were affidavits by the directors and secretary of the company, as well as by Dunster himself, showing the facts already stated, and, further, that the application by and allotment to the firm were intended and regarded as a performance of the contract previously entered into by Dunster on behalf of the firm, and that Dunster was never considered by any of the parties as having agreed to take any shares beyond those which were registered in the name of his firm.

On 18 July, 1894, VAUGHAN WILLIAMS, J. dismissed the summons.

Dunster appealed.

Buckley, Q.C., and *Methold*, for the appellant :

It is clear that in fact there was, and was intended to be, only one agreement to take shares. The company have Dunster *plus* Wakefield on the register ; all that the original application entitled them to, and more. There is nothing in the argument on which the learned Judge relied, that the right of set-off would have been different if Dunster alone had been on the register. Art. 29 provides for a lien on shares standing in joint names. Dunster was not bound to hold the shares for any particular time, and might at once have transferred them to the firm. What was done was at most only such a transfer without a transfer deed. *In re Crooke's Mining and Smelting Co.*, *Gilman's case* (1), is on all-fours with this case.

[They were stopped by the Court.]

Farwell, Q.C., and *E. S. Ford*, for the respondent :

There are two contracts to take shares. Dunster, having subscribed the memorandum, became, under the rules, one of the first directors of the company, and was therefore bound to take 100 shares. These shares cannot be held jointly with somebody else. Under section 23 of the Companies Act, 1862, he is liable for 100 shares without any application. If he may share with one person

(1) 31 Ch. D. 420; 55 L. J. Ch. 509; 54 L. T. 205; 34 W. R. 362.

he may share with twenty, and his stake in the company becomes illusory. *In re China Steamship, &c. Co., Drummond's case* (2), is clearly distinguishable: *Gilman's case* (1) was decided simply on grounds of fact; *Nokes's case* (3) is not against us: to follow that you must take the firm off the list and put on Dunster alone, but that is impossible.

[DAVEY, L.J.: Even the set-off argument comes to nothing: art. 29.]

[They also cited *Bainbridge v. Smith* (4), *Pulbrook v. Richmond Consolidated Mining Co.* (5), *In re London Hamburg and Continental Exchange Bank, Evans's case* (6).]

LINDLEY, L.J.: With great respect to Mr. Justice VAUGHAN WILLIAMS, I think he has gone wrong in this case. The real question here is whether there was one contract to take shares, or two. No doubt, on the first blush of the thing, it looks as if there were two. Dunster signed the memorandum of association of this company for 100 shares. That made him liable to take 100 shares, and he cannot get out of it. But now it is sought to put him on the register for another 100 shares, and the ground of that is that, by a letter dated about a fortnight after, he applied for 100 shares in the name of his firm, and 100 shares were allotted to him and his partner Wakefield. The question is, whether that application was really anything more than carrying out the original agreement that his firm should take 100 shares in the company. There was an arrangement before the company was incorporated. Dunster & Wakefield were paper makers, and the company was a paper mills company, and the arrangement was that the firm should take 100 shares in the company, and should become the agents of the company on certain terms. When the time came for signing the memorandum of association, Dunster wanted to sign it in the name of the firm, but he was told that a firm name would not be

(2) L. R. 4 Ch. 772; 21 L. T. 317; 18 W. R. 2.

(3) 37 L. J. Ch. 624; 18 W. R. 1135.

(4) 41 Ch. D. 462; 60 L. T. 879; 37 W. R. 594.

(5) 9 Ch. D. 610; 48 L. J. Ch. 65; 27 W. R. 377.

(6) L. R. 2 Ch. 427; 36 L. J. Ch. 501; 16 L. T. 252; 15 W. R. 476.

accepted by the Registrar of Joint Stock Companies. So he signed in his own name, but the real truth is that he was signing for the firm. After that, in pursuance of the same arrangement that the firm should become agents for the company, which was always an understood thing on both sides, there is an application for shares by the firm. Is that anything more than carrying out an agreement previously made, or is it, in truth, another agreement to take another 100 shares? The evidence is all on one side. It is plain that the intention was merely to perform the agreement Dunster had entered into on behalf of the firm. It is not true to say there were two agreements to take 100 shares, one by him and one by the firm. The documents would have supported the allegation of two agreements if in fact there had been two; but the fact is there was only one. Then, how is it in point of law? Why should Dunster be fixed with 200 shares? That was not the agreement, and nobody so understood it—neither he nor the directors or secretary of the company. That is the true solution of this case.

Then something is said about a director's qualification shares. I do not feel any difficulty about that. Art. 73 says that the qualification of a director shall be the holding of 100 shares, and the director need not acquire them at once. Dunster did not "hold" these shares the less because he held them jointly with another person. The object of the rule was that he should take 100 shares and be responsible on them, and if the company chose to take the extra responsibility, or additional responsibility, of his partner, that makes no difference. I think the question is reduced to one of fact, whether there were two agreements to take 100 shares. It is clear there were not, and therefore I think this appeal must be allowed, with costs here and below.

LOPES, L.J. : I am of the same opinion ; and I quite agree with the last observation of my brother LINDLEY, namely, that the question in this case is really a question of fact. Was there one contract, or were there two contracts—that is to say, what is the inference to be drawn from the circumstances placed before us in evidence? Dunster & Wakefield were paper manufacturers, and it appears that Dunster signed the memorandum of association of this com-

(LOPES, L.J.)

pany for 100 shares. But in what circumstances did he do that? He wished and intended to sign the name of the firm, and he would have done so, but he was told that it was not right to sign the memorandum of association in the name of a firm, and thereupon he signed in his own name, meaning thereby, "I sign in my own name, but as and for the firm." Subsequently the company is formed, and then that is done which seems a work of supererogation: an application is sent in in the name of the firm for 100 shares. Then it is said that that is a separate agreement, and that Dunster ought to be on the register for another 100 shares as well. In my opinion that is wrong. It is only one contract. That which is alleged to be the second is simply a performance of the original contract. It is impossible to contend, with anything like reasonableness, that there are two agreements here. There was no intention from first to last to take 200 shares. The whole meaning of the thing is that there is only one contract.

With regard to the qualification shares, I agree there is no difficulty about that. Dunster held 100 shares, and was qualified to be a director.

DAVEY, L.J.: In my opinion we should be doing a gross injustice if we affirmed this order. We should be imposing a liability upon this gentleman which neither he nor any of the other parties ever intended or dreamt of. If we are to believe the statements made upon oath, not only by Dunster, but by the secretary and the four directors of the company, not one of whom has been cross-examined, there can be no question that there was one contract and one alone, and that Dunster, when he made the application in his own name, did so with the intention of carrying out the informal arrangement—informal because not binding on the company—that his firm were to take 100 shares in this company. That then became a contract of the company. The application in the name of Dunster & Wakefield is proved to have been made for the purpose of formally getting the shares into the name of Dunster & Wakefield, and in my opinion it would be an outrage to hold that there were two contracts in this case. We should be going contrary to the intention of everybody connected with the transaction. Nor

do I think the documents relied on for the respondent, when properly understood, are in the least degree inconsistent with this view. In general, they appear to have put into writing the terms upon which the shares were to be taken, and to have settled those terms, which may not have been exactly fixed till that time. But that is not inconsistent with Dunster having signed the memorandum of association, and his firm having taken the 100 shares, in pursuance of an arrangement with the promoters that they should be agents for the company; and, in fact, the company employed them as agents from the time it was formed.

I am of opinion that there was only one contract in this case, and that that was by Dunster to take 100 shares. It is proved that he entered into that contract on behalf of his firm, and it is, to my mind, proved that the application in the name of Dunster & Wakefield for 100 shares was made only for the purpose of carrying out that contract.

Mr. Farwell has raised another point, not mentioned in the judgment of the learned Judge, that Dunster was one of the first directors of this company, and was therefore under an obligation to be the holder of 100 shares. I do not think it necessary to go into that, because this is an application to put Dunster on the register for 100 shares, not on the ground that he is a director, but on the ground of his having expressly contracted with the company to take them; but I entirely agree with Lord Justice LINDLEY, that a man is none the less the holder of 100 shares because the company has the additional advantage of having another person joined with him, these gentlemen being jointly and severally liable on the shares.

I am therefore of the opinion that this order ought to be discharged, and Dunster's name removed from the register.

Appeal allowed.

Solicitors: *Blachford, Riches & Co.*, for the Appellant.

Goldring & Bell, for the Respondent.

IN RE DANIELL'S SETTLED ESTATES.

1894, August 9. LINDLEY, LOPES AND DAVEY, L.JJ.

Settled Land—Lease by Tenant for Life—“ Building lease ”—Covenant by Lessee to spend a specified Sum in doing scheduled Repairs—Discretion of Court—Settled Land Act, 1882 (45 & 46 Vict. c. 38), ss. 2, subs. 10 (iii.), 6, 8, subs. 1, 63—Settled Land Act, 1884 (47 & 48 Vict. c. 18), s. 7 (i.).

Semble, a lease by which the lessee covenants to expend a fixed sum in doing repairs specified in a schedule to the lease is a “ building lease ” within the meaning of section 2, subsection 10 (iii.), and section 8, subsection 1 of the Settled Land Act, 1882, and the Court has therefore jurisdiction under section 7, subsection i. of the Settled Land Act, 1884, to give leave to a person who by virtue of section 63 of the Settled Land Act, 1882, is tenant for life of settled property, to grant such a lease for any term not exceeding ninety-nine years. The giving of such leave is, however, in each case a matter in the discretion of the Court.

APPEAL from North, J.

Harriett Edith Daniell was, under her marriage settlement, dated 21 October, 1893, entitled for her life to the income of the proceeds of sale of certain real estate, and was accordingly, under section 63 of the Settled Land Act, 1882, to be deemed to be tenant for life of such real estate. By section 7 (i.) of the Settled Land Act, 1884, the leave of the Court is necessary in such a case to the exercise by the tenant for life of any of the powers conferred by the Settled Land Act, 1882.

On 4 May, 1894, Mrs. Daniell entered into an agreement, conditional upon the leave of the Chancery Division being obtained, to grant to one James Dick a lease the terms of which were set out in a schedule to the agreement. By the draft lease Mrs. Daniell purported to demise the settled property to Dick for a term of thirty years at a yearly rent of 350*l.* for the first seven years, 375*l.* for the next seven years, and 400*l.* for the rest of the term, the lessee covenanting to execute on the demised premises, at an expense of not less than 200*l.*, certain repairs and improvements specified in a schedule to the lease. By section 6 of the Settled Land Act, 1882, no lease other than a building or mining lease can be granted for a term exceeding twenty-one years. It was contended that, in view of the covenant to repair, the proposed lease was a “ building lease ” within the meaning of the Settled Land Act, 1882.

By an originating summons dated 8 June, 1894, Mrs. Daniell asked that she might be at liberty to grant the lease. On 16 July, 1894, NORTH, J., at Chambers dismissed the summons, being of opinion that the proposed lease was not a "building lease" within the Act. The learned Judge having certified that he did not require any further argument, Mrs. Daniell appealed.

Howard Wright, for the appellant :

The proposed lease, though not what would in ordinary language be called a "building lease," is within section 8, subsection 1 (1) of the Settled Land Act, 1882, for it purports to be granted in consideration of a covenant to repair. By section 2, subsection 10 (iii.), "building" includes improving and repairing buildings. What makes this stronger is that the Settled Estates Act, 1877, section 4, distinguished building and repairing leases, and by the Settled Land Act the Legislature, no doubt advisedly, classes them together. Moreover, the definition of a "building lease" in section 2, subsection 10 (iii.) is the same as that in section 2 (x.) of the Conveyancing Act, 1881, with the insertion of the word "any" before "building purposes." Compare with section 18, subsection 9 of the Conveyancing Act, 1881, section 8, subsection 1 of the Settled Land Act, where the word "partly" is inserted.

[DAVEY, L.J. : I am not satisfied that an agreement to execute scheduled repairs is enough. Does "repairing" not mean putting the premises in repair generally?]

Henry Fellows, for the trustees of the will :

The trustees desire that the lease should be sanctioned, if it properly can be.

LINDLEY, L.J. : In this case I am disposed to think, on the true construction of the various sections of the Settled Land Act to which we have been referred, and especially of section 8, that there

(1) Section 8, subsection 1 of the Settled Land Act, 1882, provides :—

"Every building lease shall be made partly in consideration of the lessee or some other person having erected, or agreeing to erect, buildings, or having improved or repaired,

or agreeing to improve or repair, buildings, or having executed, or agreeing to execute, on the land leased, an improvement authorized by this Act, for or in connexion with building purposes."

(LINDLEY, L.J.)

is jurisdiction to give our sanction to this proposed lease. Section 8 is this: [The Lord Justice read the section (1), and continued :] Well now, I think it would be rather a narrow construction to say that "agreeing to improve or repair buildings" does not include an agreement to lay out a fixed sum of money in repairs. The other construction must be that it applies only to an agreement to repair generally, and to expend such money on it as is necessary. I am not disposed to think that our power is so contracted.

But then the Legislature has entrusted the Court with a discretion, and this lease cannot be granted without our sanction. [The Lord Justice then dealt with the circumstances of the particular case, coming to the conclusion that the lease ought not to be sanctioned.]

LOPES, L.J. : The lease that we are asked to sanction is for thirty years, and a lease for thirty years cannot be granted without the sanction of the Court. The question is whether we ought to give our sanction in this particular case. I have come to the conclusion that we ought not. It is a matter of discretion. I feel clear, having regard to the very general terms of the Act, and to the different parts of it that have been brought to our notice, that there is jurisdiction to grant a lease of this kind in a case where a substantial amount is to be laid out in repairs, in the ordinary sense of the word. But then one has to look at the particular repairs it is proposed to do. [The Lord Justice considered the nature of the proposed repairs, and came to the conclusion that the discretion of the Court would be rightly exercised by refusing to sanction the proposed lease.]

DAVEY, L.J. : I am of the same opinion.

Appeal dismissed.

Solicitors: *Freshfields & Williams*, for the Appellant.

Rooper & Whately, for the Trustees.

IN RE SMITH, SMITH v. LANCASTER.

1894, July 25; August 8. LORD HERSCHELL, L.C., AND LINDLEY
AND DAVEY, L.JJ.

Settled Land—Several Persons constituting one Tenant for Life—Sale—Separate Solicitors—Costs—Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 2, subs. 6; s. 53—General Order made in pursuance of the Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44), sch. 1, pt. 1.

Where several persons entitled as tenants in common together constitute a tenant for life for the purposes of the Settled Land Act, 1882, they need not, on a sale of the settled land, employ a common solicitor to complete the sale; and costs of separate solicitors for perusing and completing conveyance will be allowed out of the proceeds.

APPEAL from Kekewich, J.

Under the trusts of the will of the above-named testator twenty-five persons entitled as tenants in common together constituted a tenant for life for the purposes of the Settled Land Act, 1882. Upon a sale in lots of the land subject to the settlement in question under the powers of the Act, a solicitor, Mr. Fowle, was, by arrangement amongst the parties, employed to conduct the sale, and was mentioned in the conditions of sale as the vendors' solicitor. Mr. Fowle conducted the sale and signed the several contracts of sale on behalf of all the twenty-five persons. Twenty-one of the twenty-five employed no other solicitor to complete the carrying out of the sale on their behalf, and Mr. Fowle perused the several conveyances and completed the matter for them, but the remaining four employed separate solicitors, not to interfere in the sale, but to peruse and approve the conveyances on their behalf, who, accordingly, having the several conveyances sent them by Mr. Fowle, perused them for their clients, and obtained the execution of them by them.

In these circumstances the chief clerk was of opinion that there should be only one bill of costs allowed for the vendors, but that it was reasonable that Mr. Fowle should send the several conveyances for execution by such of the vendors as did not instruct him for the purpose to the separate solicitors of the others, and that each of such separate solicitors should be paid 3*l.* 3*s.* for

obtaining the execution by his clients ; but he did not allow them anything for perusing the conveyances or other charges.

KEKEWICH, J., saw no reason why some few of a large body of tenants in common for life should indulge in the luxury of separate solicitors at the expense of the *corpus*, and held that the independent solicitors were entitled to no costs at all out of the proceeds of sale, and allowed only one set of costs, *i.e.*, those of Mr. Fowle.

From that decision the present appeal was brought by the four persons who employed the separate solicitors.

H. Terrell, for the appellants :

The costs of the separate solicitors for perusing and obtaining execution of the conveyances ought to be allowed : *Humphreys v. Jones* (1), which was a partition action, but the principle is applicable.

G. Williamson, for the other twenty-one tenants for life :

The only costs to be allowed are those of the one solicitor who is fixed upon to conduct the sale. A tenant for life exercising any power under the Settled Land Act is to have regard to the interests of all parties concerned, and is in the position, as regards them, of a trustee : section 58, *Cardigan v. Curzon-Howe* (2).

Fawcus, for the trustees.

[At the conclusion of the arguments the Court intimated that they wished to see the correspondence before giving judgment, in order to ascertain whether any agreement had been come to between the tenants for life that one solicitor who conducted the sale should peruse the conveyances for all of them.]

Cur. adv. vult.

August 8.

LORD HERSCHELL, L.C. : [after stating the facts, continued :] The question is whether the costs incurred by the four persons, together with the costs incurred by the other twenty-one, who together make up the tenant for life, are to be allowed, Mr. Justice KEKEWICH

(1) 31 Ch. D. 30 ; 55 L. J. Ch. 1 ; 53 L. T. 482 ; 34 W. R. 1.

(2) 41 Ch. D. 375 ; 58 L. J. Ch. 436 ; 60 L. T. 723 ; 37 W. R. 521.

having allowed one set of costs only, those of Mr. Fowle, out of the proceeds of the sale.

It was contended for the appellants that they were entitled to employ their own independent solicitors, if they pleased, to peruse the several conveyances which they would have to execute, and there was nothing to compel them to make use of a common solicitor; and in fact the instructions given to Mr. Fowle did not include any authority to peruse on behalf of the vendors. The General Order made in pursuance of the Solicitors' Remuneration Act, 1881, which was relied on by the respondents, contains a scale of charges fixed for a vendor's solicitor for conducting a sale of property by public auction, including the conditions of sale, and there is a further scale for deducing title to freehold, copyhold or leasehold property, and completing conveyance (including preparation of contract and conditions of sale, if any), and it was said that the fee specified in the scale covered all that was done in the present case for all parties. But it is obvious that, if there was any part of the work of perusing which was not done by Mr. Fowle, and which he was not authorized to do, he would not be entitled to charge for that, because he would not have done the work. The question is whether, inasmuch as the appellants did not authorize Mr. Fowle to act for them in perusing the conveyances, there is anything by which they were disentitled from employing their own solicitors for the purpose. I do not think there was. There was no obligation upon them to employ Mr. Fowle any more than there was upon the other twenty-one to employ their solicitors. Of course it is desirable that all parties in such a case as this should agree to employ a common solicitor instead of independent ones, but if they do not there is nothing in the statute to compel a minority to accept the will of the majority. The onus is upon those who impeach the appellants' right to employ separate solicitors to show something which prevents their doing so, and which disentitles them to costs if they do. The only section of the Act which was referred to is the 53rd, which says that "a tenant for life shall, in exercising any powers under this Act, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee

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for those parties ;" but I do not think that section is at all applicable to the present case. No doubt it is quite right that the person who exercises a right conferred on him by the Act, where other persons are concerned, should not have regard only to his own interests, but that does not touch the right of those who, taking part in a sale such as the present, and having to some extent independent interests and obligations, have, as it seems to me, an independent right to have the conveyances perused by their own solicitors, and prefer to do so instead of employing someone else's solicitor.

I think, therefore, the appeal should be allowed.

LINDLEY, L.J. : I am of the same opinion. When the case was before the Court a fortnight ago for argument, I rather gathered, though I had some doubt in my mind about it, that the four might possibly have agreed to employ Mr. Fowle to complete the conveyance for them, and if so, it would have been a breach of faith on their part to adopt the course which they have since adopted ; and in order to solve that doubt, I asked to see the correspondence. I have perused it, and found there was no ground really for my supposition. That being so, I consider the appellants were entitled to take the course they did, and there was no need for all to employ one solicitor.

DAVEY, L.J. : I agree.

Appeal allowed.

Solicitors : *Andrew, Wood & Co.*, for *C. Waistell*, Northallerton,
for the Appellants.

Williamson, Hill & Co., for *Fowle & Horsfall*, Northallerton,
for the Respondents.

WIGRAM v. BUCKLEY.

1894, July 19; August 4. LORD HERSHELL, L.C., AND LINDLEY AND DAVEY, L.JJ.

Lis pendens—How far applicable to Chattels—Mortgage of Book Debts—Notice to Debtors—Receiver in Foreclosure Action—Laches—Subsequent Incumbrancer without Notice—Priority—2 & 3 Vict. c. 11, s. 7—30 & 31 Vict. c. 47, s. 2.

The doctrine of *lis pendens* does not apply to personal property, except leaseholds, and possibly money in Court.

A mortgagee who takes an assignment of property without notice of any defect in his assignor's title acquires a good title notwithstanding that his assignor has in fact been restrained by injunction and the appointment of a receiver from dealing with such property.

Where a mortgagee who has obtained an order appointing a receiver and restraining the mortgagor from dealing with the property comprised in the mortgage takes no further steps, either by himself or by the receiver, to perfect his security, such neglect constitutes *laches* which will postpone him to a subsequent incumbrancer who has taken without notice of any prior incumbrance, and has used due diligence.

APPEAL from Chitty, J.

In December, 1885, the defendants assigned to the plaintiffs, by way of security for a loan, (*inter alia*) the goodwill of the defendants' business, and all the book and other debts then due and owing, or which during the subsistence of the security should become due and owing to the defendants on account of their business. The deed contained a power to get in the debts. On 28 June, 1892, the plaintiffs commenced an action in order (*inter alia*) to recover the money due to them on their security, and for foreclosure or sale. On 1 July, 1892, they registered the action as a *lis pendens*, and on 29 July, 1892, they obtained by consent an order appointing a receiver of the debts comprised in the security, and restraining the defendants from carrying out a certain agreement for the sale of their business and book debts, and from disposing of any share or interest in the business, or any of the property belonging thereto, otherwise than in the usual course thereof, in contravention of the covenants contained in the mortgage of December, 1885. No notice of the plaintiffs' security, or of any of the proceedings to enforce it, was ever given to the debtors of the defendants.

In 1893, by three assignments made for value and by way of

security, the defendants purported to assign to the London Banking Corporation some of the debts comprised in the plaintiffs' security, and the Banking Corporation at once gave notice to the debtors whose debts were so assigned. The Banking Corporation had no notice of the plaintiffs' security, or of any of the subsequent proceedings. On 28 November, 1893, the Banking Corporation obtained judgment against the defendants for the amount secured by the three assignments already mentioned. On 30 November, 1893, the receiver for the first time took possession and claimed the debts. The Banking Corporation then took out a summons asking that notwithstanding the order of 29 July, 1892, they might be at liberty to get in the debts so assigned to them. On 1 May, 1894, CHITTY, J., dismissed the summons. The Banking Corporation appealed.

Horace Kent, for the appellants :

The doctrine of *lis pendens* does not apply to chattels. It is common ground that there is no express decision on the point. But all the text-writers assume that the effect of *lis pendens* is confined to land. Williams on Personal Property does not mention *lis pendens* at all. What JAMES, L.J., says in *Berry v. Gibbons* (1) is only *obiter*, and need not extend to chattels. Counsel there treat it as evident that at most it can only apply to specific chattels.

[Lord HERSCHELL, L.C. : Would not the effect of CHITTY, J.'s, decision be to give *lis pendens* a wider effect than a registered judgment has ?]

Yes. It would override the order and disposition clause of the Bankruptcy Act, 1883. KAY, J., dealt with the chief cases on the subject in *Price v. Price* (2). In *Mead v. Lord Orrery* (3) Lord HARDWICKE laid down the law to the effect that a *lis pendens* "cannot affect any particular person with a fraud, unless there was a special notice of the title in dispute there to that person." In *Is*

(1) L. R. 8 Ch. 747 ; 29 L. T. 88 ; 21 W. R. 754.

(2) 35 Ch. D. 297, 301 ; 56 L. J. Ch. 530 ; 56 L. T. 842 ; 35 W. R. 336.

(3) 3 Atk. 235, 243.

re Barned's Banking Co., Ex parte Thornton (4), both the Lords Justices assume that *lis pendens* affects only real estate. The word used in section 7 of 2 & 3 Vict. c. 11 is "estate," a term not properly applicable to personalty.

[Lord HERSCHELL, L.C.: That word is not necessarily restricted to realty. You speak of a bankrupt's "estate," which includes personalty.

DAVEY, L.J.: "Personal estate" is a perfectly good legal expression.

Lord HERSCHELL, L.C.: I do not know why you need an injunction in the case of an action on a bill of exchange if a *lis pendens* is notice to all the world.

LINDLEY, L.J.: I do not remember any case which extends the effect of *lis pendens* to chattels other than leaseholds and money in Court.]

I certainly had no notice of the receiver or the injunction, and am not affected by them.

Levett, Q.C., and A. W. Rowden, for the respondents:

We have the earlier assignment, and the doctrine of prior notice cannot apply where, as here, the assignment was contrary to the express order of the Court.

[Lord HERSCHELL, L.C.: If the receiver does not choose to perfect his title, I do not see anything shocking in another person getting a good title.]

In *Ward v. Duncombe* (5) Lord MACNAGHTEN treats the rule in *Dearle v. Hall* (6), that priority may be acquired by prior notice, as an arbitrary rule which ought not to be extended. The principle upon which *lis pendens* is founded, that a man has no right to

(4) L. R. 2 Ch. 171; 36 L. J. Ch. 190; 15 L. T. 523; 15 W. R. 524.

(5) 1 B. 224; [1893] A. C. 369; 62 L. J. Ch. 881; 69 L. T. 121; 42 W. R. 59.

(6) 3 Russ. 1

make litigation endless by assigning *pendente lite*, applies here. Elphinstone and Clarke in their work on Searches (p. 164) advise purchasers of choses in action to search for *lites pendentes*. Whatever may be the law, actions would not, as the other side suggest, be brought for articles of trifling value, and the ordinary business of life would not be impeded.

[LINDLEY, L.J.: Are you not minimizing the consequences too much? What about bankers lending money on shares? Must they search?

DAVEY, L.J.: If you succeed it will have a most serious effect upon Stock Exchange transactions, for there you do not know from whom you are buying, and cannot protect yourself even by searching.]

A *lis pendens* does not of itself create an incumbrance, but is notice to all the world of the action: *Bull v. Hutchens* (7). In *Price v. Price* (2) KAY, J., did not dissent from the decision of ROMILLY, M.R., in *Bull v. Hutchens* (7). It may be that the Court can draw a line, and say that *lis pendens* applies to choses in action, such as the book debts here in question, but not to all chattels.

[They also cited *Metcalf v. Pulvertoft* (8).]

Kent, in reply:

The sole question is, am I by virtue of the *lis pendens* to be taken to have had notice of the action? The same rule must apply to choses in action and other chattels.

Cur. adv. vult.

August 4.

LINDLEY, L.J.: The Lord Chancellor asks me to say that he concurs in the judgments about to be delivered.

This is an appeal by the London Banking Corporation from a refusal to allow them to get in certain debts assigned to them by way of security, of which debts a receiver had been appointed.

(7) 32 Beav. 615, 618; 11 W. R. 866.

(8) 2 Ves. & B. 200; 13 R. R. 63.

[The Lord Justice stated the material facts, and continued:] It was not disputed that, if the plaintiffs' action had not been registered as a *lis pendens*, and if there had been no injunction or receiver, the Banking Corporation, having no notice of the plaintiffs' title, would have acquired a better title than the plaintiffs to the debts assigned to them, although they were comprised in the plaintiffs' earlier security. This was conceded on the authority of *Dearle v. Hall* (6), and is not open to controversy. But the plaintiffs contended, and the learned Judge held, that as the debts were the subject of an action to recover them, and as such action was registered as a *lis pendens*, and a receiver of those debts had been appointed, and the defendants had been restrained from dealing with them, the title of the defendants could not be allowed to prevail over that of the plaintiffs.

The doctrine involved in this decision is very far reaching, and is of great practical importance to business men, and it requires very careful examination. For the reasons which I will state, I am clearly of opinion that the doctrine is unsound and cannot be supported. I will first consider the effect of the registration of the plaintiffs' action as a *lis pendens*, and I will then consider the effect of the order for an injunction and a receiver.

In *Sorrell v. Carpenter* (9) the Lord Chancellor said, "where there is a conveyance made *pendente lite*, . . . even though the alienation be for never so good a consideration, yet if made *pendente lite*, the purchase is to be set aside; and this in imitation of the proceedings in a real action at common law, where, if the defendant aliens after the pendency of the writ, the judgment in the real action will overreach such alienation. But where there is a real and fair purchaser without any notice, it is a very hard case, especially in a Court of equity, to set such purchase aside." The judgment in a real action, if in favour of the demandant, was that he recover seisin of the land, and the writ of execution upon it was a writ of *habere facias seisinam*, which directed the sheriff to cause the demandant to have seisin of the lands which he had recovered: see Roscoe on Real Actions, pp. 328, 341.

There were no similar judgments or writs in actions at common law to recover goods and chattels. Even in detinue the defendant

(LINDLEY, L.J.)

could, before the Common Law Procedure Act, keep the chattel he had got on paying its value to the sheriff. It is true that the goods which a defendant had at the date of the writ of execution could be taken even from a subsequent purchaser, unless in market overt : see Com. Dig. Execution, D. 2 ; but this is a very different matter.

So far, therefore, as goods and chattels are concerned, the doctrine that no title could be made to them by an unsuccessful defendant pending litigation for their recovery had no foundation in common law ; and if the rule was different in equity such rule cannot be based on the principle that equity follows the law. Any such doctrine would, if logically carried out, practically greatly embarrass ordinary trade, and be, to say the least, highly inconvenient to everyone except plaintiffs claiming goods. If the doctrine of *lis pendens* were applicable to personal property generally, bankers and others could not safely make advances on ships or goods, and that which represents them in commerce, *e.g.* bills of lading, dock warrants, wharfingers' receipts, nor upon stock and share certificates, nor upon debentures or policies, nor even on negotiable securities, without making searches in the judgment registry office. Such a doctrine would paralyse the trade of the country, and there is no warrant for it either in the statutes relating to *lis pendens* or in the decisions of the Courts.

The first statute on the subject is 2 & 3 Vict. c. 11, s. 7. The language of this statute shows that the Legislature was dealing with estates in land, and land only. It is true that in the Act 30 & 31 Vict. c. 47, s. 2, the word "property" is used instead of "estate," but this variation in language by no means warrants the inference that the Legislature was altering the law by extending the effect of registration to ordinary goods and chattels. Nor has it ever been so understood.

Reliance was placed on *Bellamy v. Sabine* (10), but that was a case of real estate, and there is no ground for supposing that the observations made in that case were intended to apply to personal property. Similar remarks apply to the instructive judgments in *Winchester v. Paine* (11) and *Metcalf v. Pulvertoft* (8). Again,

(10) 1 De G. & J. 566 ; 26 L. J. Ch. 797 ; 6 W. R. 1.

(11) 11 Ves. 194 ; 8 R. R. 131.

reliance was placed on the practice of conveyancers who advise purchasers and mortgagees of personal estate to search the *lis pendens* registry. This is intelligible and reasonable enough. Conveyancers advise on abstracts of title, and always try to keep their clients out of difficulties and possible litigation. If an abstract of title to personalty is laid before a conveyancer, he naturally advises an intending purchaser or mortgagee to make such inquiries as experience shows to be prudent in order to avoid trouble and vexation in future.

There is no case in the books which warrants the notion that the doctrine of *lis pendens* applies to personal property other than leasehold property. It is true that Lord ROMILLY in *Berry v. Gibbons* (1) decided that the doctrine applied as well to goods and chattels as to land; but his decision was reversed on appeal, and there is nothing in the judgment of the Court of Appeal which justifies the inference that the Court of Appeal shared his opinion. The Court of Appeal gave an excellent reason for their decision, viz., that the registration of an administration suit as a *lis pendens* did not prevent an executor from disposing of the assets and conferring a good title to them. It was unnecessary to say or decide more. This was not the first case in which the Court of Appeal differed from the view taken by Lord ROMILLY of the effect of registering a proceeding as a *lis pendens*. In *Ex parte Thornton* (4), a winding-up petition was registered as a *lis pendens* against a contributory, and Lord ROMILLY refused to set aside the registration. But on appeal the then Lords Justices TURNER and CAIRNS reversed his decision, and it is impossible not to see from their judgments that they considered that the registration of the petition affected land only, and in that case the land of the company sought to be wound up. Lord CAIRNS, on p. 179, points out that section 153 of the Companies Act, 1862, expressly makes void alienation of a company's real and personal estate after a winding-up petition is presented; and he says distinctly that section 114, the *lis pendens* section, has no reference to personal estate at all.

Upon principle and authority I am of opinion that the doctrine in question is inapplicable to personal property other than chattel interests in land. The inconvenience of extending the doctrine to ordinary personal property is so extremely serious that it would, in

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my opinion, be very wrong so to extend it now for the first time, even if such extension could be justified by reasoning from well-established general propositions which might serve as premises for arriving at such a conclusion.

But then it is said that in this case there was not only a registered *lis pendens*, but an injunction and a receiver. But of these the present claimants had no notice whatever when they advanced their money and obtained and perfected their security. Their title is in no way affected by those orders; nor have the claimants, the bank, been guilty of any contempt of Court. The case would have been different if the bank had had notice of the order appointing the receiver or granting the injunction, or even if the receiver had given notice to the debtors to pay their debts to him. Such a notice would have been equivalent to notice by the plaintiffs of the assignment to them.

Lastly, I am of opinion that, in addition to all other grounds, the *laches* of the plaintiffs disentitles them from invoking the aid of the Court against the bank. The plaintiffs gave the debtors whose debts were assigned to them no notice of the assignment, nor of the action, nor of the injunction, nor of the appointment of the receiver. They left the defendants to carry on their business and deal with the debts owing to them as if no assignment of them had been made. The action was not prosecuted with diligence. No step was taken in it between July, 1892, and the end of November, 1893, by which time the bank had not only acquired and perfected their title, but had obtained judgment, and sought to enforce it. This *laches* alone is fatal to the plaintiff's case, and would be so even if the doctrine of *lis pendens* could be invoked by them. See Sugden on Vendors and Purchasers (14th edit., p. 758), citing his decision in *Drew v. Lord Norbury* (12).

The appeal must therefore be allowed.

DAVEY, L.J.: It is admitted that there is no recorded decision in the Court of Chancery or in this Court in which the doctrine of *lis pendens* has been applied to the title to a chattel or chose in action

so as to postpone a person taking *pendente lite* without notice, who but for the existence of the action would have a good title against the plaintiff, if the case of *Berry v. Gibbons* (1) before Lord ROMILLY be excepted. The foundation of the doctrine has been said to be by analogy to what was done in real actions. If so, there is a *primâ facie* presumption that the doctrine was applicable to real estate only. There can undoubtedly be found in the judgments of very eminent Judges of the Court of Chancery statements of the doctrine which are in terms general and equally applicable to personal estate as real estate. Vice-Chancellor PLUMER's judgment in *Metcalf v. Pulvertoft* (8) is as good an example as any, and the maxim *pendente lite nihil innovetur* has been more than once cited. But it will be found on examination that such expressions of opinion, although general in terms, have been invariably made in cases dealing with real estate alone, and may therefore be interpreted as having reference to real estate only. The language of sections 4 and 7 of 2 & 3 Vict. c. 11, providing for registration of *lis pendens* and the registration thereof, is in my opinion favourable to the inference that the provisions of those sections were considered to apply to real estate only; and it is impossible to read the judgments of Lord Justice TURNER and Lord CAIRNS in *In re Thornton* (4) without coming to the conclusion that the learned Judges treated the registration of *lis pendens* as affecting real estate only, and indeed Lord CAIRNS expressly says so on p. 179 of the report, although, as the particular question was not then under discussion, his words cannot be regarded as a decision. Great weight must, of course, be given to the opinion of a learned and experienced Judge like Lord ROMILLY; but his decision on the case before him was overruled on other grounds, and I cannot agree with Mr. Justice CHITTY in holding that the Court of Appeal, because they found other sufficient grounds for differing from Lord ROMILLY's judgment, and did not expressly dissent from his view of the law, must be taken to have given it the weight of their authority.

In this state of the authorities, I am of opinion that the Court of Appeal is at liberty to say, and must say, whether they will apply the doctrine to a case like the present affecting the title to choses in action, and in coming to a decision on that point the Court ought to have regard to the effect of such an application on the business and

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dealings of mankind. This very case is as good an illustration as another. A man claiming to be mortgagee of the present and future book debts of a firm commences an action to enforce his mortgage, obtains by consent the appointment of a receiver and an injunction to restrain the defendants from dealing with the book debts, and does nothing more. Neither the plaintiff nor the receiver gives any notice to the debtors from whom the book debts are due, which are left in the order and disposition (to borrow an expression from the bankruptcy law) of the defendants. A year afterwards the defendants assign certain book debts (some of which were not even due at the date of the commencement of the action) to the applicants, who, without any notice of the plaintiff's claim, complete their title by giving notice to the debtors. It is said that they ought to be postponed to the plaintiff, because the latter, on 1 July, 1892, registered the action as a *lis pendens*. Is it reasonable and in accordance with the habits of business people to expect persons who deal in shares of joint-stock companies, bills of exchange, bills of lading, book debts, and other similar property, to search the register of *lis pendens* before concluding any contract of sale or mortgage, at the risk of losing their money if the property in question is the subject of an action, or of an order for an injunction or a receiver? Suppose an action to enforce a trust against the legal registered holder of shares in a railway company. He sells them in breach perhaps of an injunction, and another person (probably not the immediate purchaser from him) takes a transfer. Would it be right or just to hold the transferee subject to whatever equitable rights may ultimately be established in the action? Could the multifarious business of life be carried on on such terms? Real estate and leaseholds stand on a different footing, because they are the subjects of title, and no prudent person in this country deals with them without at least some investigation of title. And this is known and recognized amongst business people. It may be said that the applicant derives title through the breach of an injunction by the defendants. Be it so; and in that case the defendants, who have set at defiance the order of the Court, will richly deserve the severest treatment the Court can deal out to them. But how does this affect the applicants, who are not bound by the order, and have no notice

of it? I remember the warning of Lord NOTTINGHAM in the *Duke of Norfolk's case* (13): "Pray let us so resolve cases here that they may stand with the reason of mankind when they are debated abroad." Not then finding any decision in the history of the Court which binds me to decide against the appellants, and being of opinion that so to decide would not stand with the reason of mankind, I think that this appeal ought to be allowed.

I think that the *laches* of the plaintiffs in prosecuting the action and acting on the order for a receiver which they obtained, would in the present case be sufficient grounds for not postponing the appellants to their claims; but I have preferred to take the larger and higher ground.

Appeal allowed.

Solicitors: *T. Edwards*, for the Appellants.

Lindsay, Greenfield & Masons, for the Respondents.

IN RE PICKARD, EMSLEY v. MITCHELL.

1894, August 3, 4. LINDLEY, LOPES AND DAVEY, L.JJ.

Charity—Municipal Corporation Debenture Stock—Interest in Land—Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), ss. 4, 10.

Debenture stock of a municipal corporation charged upon its general revenues, though in part derived from landed property, is not an interest in land within the meaning of the Mortmain and Charitable Uses Act, 1888, s. 4.

APPEAL from North, J. (1).

Under the wills, dated respectively 22 December, 1888, and 9 June, 1891, of Andrew Pickard, who died 18 September, 1890, and Hannah Pickard, who died 29 June, 1891, certain residuary estate was given for the benefit of certain charitable institutions, not having power to hold land. Part of such residuary estate consisted of 20,000*l.* Leeds Corporation 3½ Debenture Stock, created

(13) 3 Ca. in Cha. 26, 33.

(1) [1894] 2 Ch. 88; 63 L. J. Ch. 254; 70 L. T. 395; 42 W. B. 375.

and issued under section 67 of the Leeds Corporation Act, 1867 (2), and the certificate of the stock stated that "the security for the stock and the due payment of the interest thereon is the borough fund, the borough rate, the waterworks and gasworks undertakings, the improvement rate, and the revenues respectively derived therefrom, and from all landed and other property vested in or belonging to the corporation, and any other revenue which may be acquired by them. A further security for the redemption of the stock is a sinking fund which is established and invested under Government supervision."

An originating summons having been taken out by the surviving executors of the wills of Andrew Pickard and Hannah Pickard respectively for the determination, *inter alia*, of the question whether the Leeds Corporation debenture stock was pure or impure personal estate, NORTH, J., held that it was not an interest in land within section 6 of the Mortmain Act (9 Geo. II. c. 36), but was pure personalty. One of the next-of-kin of Hannah Pickard appealed.

Byrne, Q.C., and *H. M. Humphry*, for the appellant :

The question is whether there is a charge created which is an interest in land within the Mortmain Acts. We say there is : *Brook v. Badley* (8). The stock is created under the powers of the Leeds Improvement Act, 1877, and we say that "revenues" in section 67 of the Act (2) and on the certificate is equivalent to

(2) Section 65 of the Leeds Improvement Act, 1877 (40 & 41 Vict. ch. clxxviii.), gives power to borrow certain sums of money for certain purposes on certain securities; for gasworks purposes on the security of the gasworks undertaking, borough fund and borough rate; for waterworks purposes on the security for the waterworks undertaking, borough fund and borough rate; and for other purposes on the security of the improvement rate and the revenue of any undertaking, lands and property of the corporation other than gas works and waterworks undertakings.

Section 67 confers the power to issue debenture stock, and provides that "the stock so created and issued shall be a charge upon the borough fund, the borough rate, the waterworks and gasworks undertakings, and the improvement rates and the revenues of all landed and other property vested in or belonging to the corporation respectively derived therefrom and any other revenue which may be acquired by them : but such stock shall be distributable, transmissible and transferable as and in other respects have the incidents of personal estate."

(3) L. R. 3 Ch. 672; 37 L. J. Ch. 884; 16 W. R. 947.

"rents," and, if so, this stock is undoubtedly impure personalty. The holder has a right to the appointment of a receiver in the event of non-payment: subsections 5, 6, 12 of the Local Loans Act, 1875 (38 & 39 Vict. c. 83).

In *In re David, Buckley v. Lifeboat Institution* (4) an assignment of a proportion of rates, tolls, and other moneys arising by virtue of a particular Act was held to be within the Mortmain Act. In *Driver v. Broad* (5) a contract for the sale of debentures was held to be a contract for an interest in land within section 4 of the Statute of Frauds. *Brook v. Badley* (8) was followed in *In re Watts, Cornford v. Elliott* (6). A testator's interest in partnership property, derived partly from the beneficial use of land, has been held to be within the Mortmain Act: *Ashworth v. Munn* (7); also a gift of residue for the improvement of a town: *Howse v. Chapman* (8).

Under sections 139 and 149 of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), the rents and profits of land belonging to the corporation as well as the borough rate go into the borough fund.

[DAVEY, L.J.: We must consider whether *Finch v. Squire* (9) has been or ought to be overruled.]

It is still good law. *In re Thompson, Bedford v. Teal* (10), dealt with the cases of borough and district funds; an improvement rate stands upon a different footing, and a charge, as here, upon the improvement rate and the revenues of all the landed property of the corporation is not covered or touched by the authority of *In re Thompson, Bedford v. Teal* (10).

The revenues may be intercepted before they come into the borough fund.

(4) 41 Ch. D. 168; 43 Ch. D. 27; 58 L. J. Ch. 542; 59 L. J. Ch. 87; 60 L. T. 786; 62 L. T. 141; 37 W. R. 613; 38 W. R. 162.

(5) 4 R. 411; [1893] 1 Q. B. 539, 744; 63 L. J. Q. B. 12; 68 L. T. 579; 69 L. T. 169; 41 W. R. 415, 483.

(6) 29 Ch. D. 947; 55 L. J. Ch. 332; 53 L. T. 426; 33 W. R. 885.

(7) 15 Ch. D. 363; 47 L. J. Ch. 747; 50 L. J. Ch. 107; 43 L. T. 553; 28 W. R. 965.

(8) 4 Ves. 542; 4 R. R. 292.

(9) 10 Ves. 41; 7 R. R. 337.

(10) 45 Ch. D. 161; 59 L. J. Ch. 689; 63 L. T. 471; 39 W. R. 50.

[The following cases were also referred to : *In re Hollon, Forbes v. Hardcastle* (11), *Jeffries v. Alexander* (12), *Attree v. Hawe* (13), *In re Christmas, Martin v. Lacon* (14), *Jervis v. Lawrence* (15), *In re Harris, Jacson v. Queen Anne's Bounty* (16), Tudor's Charitable Trusts, 3rd edit. p. 408, *In re Thompson, Bedford v. Teal* (10), and *Edwards v. Hall* (17).]

Cozens-Hardy, Q.C., and *Warrington*, for the respondents :

This property is pure personalty. *Finch v. Squire* (9) is no longer law ; it proceeds on cases like *Knapp v. Williams* (18), where the receiver had power to take possession of the toll-house and sit there and take the tolls : *In re Harris, Jacson v. Queen Anne's Bounty* (16), *Attree v. Hawe* (13), where debenture stock under the Companies Clauses Act, 1863, was held not to be within the Mortmain Act.

In *Jervis v. Lawrence* (15) an assignment of a proportion of rates under an Improvement Act was held not within the Mortmain Act ; also shares in an incorporated company and arrears of rent in *Edwards v. Hall* (17).

The entire description of that upon which the charge is given here shows that it is nothing less than a general charge on what may be called the "undertaking" of the corporation : *In re Ferbury's Estate, Ker v. Dent* (19) ; and, as such, it is not within the Mortmain Acts : *In re Parker, Wignall v. Park* (20). *In re David, Buckley v. Lifeboat Institution* (4), was quite a different case from the present ; there the charge was on a specific proportionate part of the tolls, here the charge is on all the revenues of the corporation, a charge similar to that upon the undertaking of a commercial body.

If the Local Loans Act, 1875, is applicable at all, it does not assist the appellant.

(11) 69 L. T. 425.

(12) 8 H. L. C. 594 ; 2 L. T. 748.

(13) 9 Ch. D. 337 ; 47 L. J. Ch. 157, 863 ; 38 L. T. 733 ; 26 W. R. 871.

(14) 33 Ch. D. 332, 342, per COTTON, L.J. ; 55 L. J. Ch. 879.

(15) 22 Ch. D. 202 ; 52 L. J. Ch. 242 ; 47 L. T. 428 ; 31 W. R. 267.

(16) 15 Ch. D. 561 ; 49 L. J. Ch. 687 ; 43 L. T. 116 ; 29 W. R. 119.

(17) 6 De G. M. & G. 74 ; 25 L. J. Ch. 82.

(18) 4 Ves. 430, n. ; 4 R. R. 252.

(19) 62 L. T. 55.

(20) [1891] 1 Ch. 682 ; 60 L. J. Ch. 195 ; 64 L. T. 257 ; 39 W. R. 346.

A holder of stock could not go to the tenants for his money, but must go to the treasury of the corporation, into which the various revenues all go.

It is said that the various items could be intercepted before they come into the borough fund, but there is nothing in the Acts to justify that.

[They also referred to *Ashworth v. Munn* (7).]

Swinfen Eady, Q.C., and *Peterson*, for other parties.

Byrne, Q.C., in reply :

In *Thornton v. Kempson* (21) a charge on rates leviable by statute on houses was held within 9 Geo. II. c. 36. *Finch v. Squire* (9) has not been overruled ; it is recognized in *In re Christmas, Martin v. Lacon* (14), and in *Chandler v. Howell* (22).

It is idle to suggest that there is anything analogous to a railway undertaking in a municipal corporation.

A specific charge is here given, and the stock is impure personalty.

LINDLEY, L.J. : I do not think we shall gain anything by taking more time to consider this case, and we are prepared to dispose of it now.

The question is whether this Leeds Corporation debenture stock was so framed as to confer on the holder of it an interest in land within the meaning of the Mortmain and Charitable Uses Act, 1888, which has consolidated the laws relating to mortmain and charitable trusts, and, in some respects, amended them. Now it is significant that section 4 of that Act omits the words "charge or incumbrance" used in the Act of George II., the definition clause (section 10, subsection (iii.)) defining "land" as "estate or interest in land." Whether that was an intentional omission or not, it looks as if there was some intention on the part of the Legislature to exclude from the operation of the Act certain classes of securities which otherwise might possibly come within the words. However, I pass that question over, and I do not make it an essential part of my decision ; but I notice it as being not altogether unimportant.

(21) *Kay*, 592.

(22) 4 Ch. D. 651 ; 46 L. J. Ch. 25 ; 35 L. T. 592 ; 25 W. R. 55.

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Let us see what this debenture stock is. The certificate of the stock is issued under the seal of the Corporation of Leeds ; it states that the holder is entitled to a certain sum of money bearing interest at $8\frac{1}{2}$ per cent. Then on the back is endorsed a condition of issue that "the security for the stock and the due payment of the interest thereon is the borough fund, the borough rate, the waterworks and gas undertakings, the improvement rate, and the revenues respectively derived therefrom, and from all landed and other property vested in or belonging to the corporation and any other revenue which may be acquired by them. A further security for the redemption of the stock is a sinking fund which is established and invested under Government supervision." Now that document in form does not purport to create any charge ; it states a fact, it states the law applicable, viz. that the security is so and so. But there is no mortgage in terms of any specific property, no assignment of anything, and there is no charge except such as is implied by what I have read ; there is a charge, but it is one which exists by virtue of the Act under the authority of which the stock is issued. The Leeds Improvement Act, 1877, gives power to borrow certain sums of money for certain purposes as therein set forth, and then, by section 67, confers the power to issue debenture stock, and provides that "the stock so created and issued shall be a charge upon the borough fund, borough rate, the waterworks and gasworks undertakings, and the improvement rates, and the revenues of all landed and other property vested in or belonging to the corporation respectively derived therefrom, and any other revenue which may be acquired by them." Now that language coincides almost exactly with the language which I have read from the certificate. Then it is enacted that "such stock shall be distributable, transmissible and transferable as and in all other respects have the incidents of personal estate."

Now the Act shows exactly what it is which is charged, and when you look you fail to find any charge or any specific assignment of any particular property, or any particular rents of any particular property, or anything of the sort, and it is significant that neither in the section nor in the certificate is there any mention of "rents ;" what you find is not "rents" but 'revenues,' which I

think is a very important difference, and which prevents the stockholder from coming and saying, "I am the assignee or mortgagee of rents," in the ordinary sense of that expression, "of certain particular land." And that there is not a charge on any particular land is further shown, I think, by section 82, which runs thus (23). [His Lordship read part of the section, and proceeded:] That shows that it is not the intention to create a specific mortgage or specific security upon any particular parcel of land.

That being so, the question is whether there is created any interest in land under the Mortmain Act, or now the Mortmain and Charitable Uses Act, 1888. When we come to look at the authorities, it is found that they do not seem to be in a very satisfactory state, but I think they may be classified under two heads. The first class would commence with *Knapp v. Williams* (18), followed by *Finch v. Squire* (9) and *In re David*, *Buckley v. Lifeboat Institution* (4), in which there was mortgaged or assigned a particular portion of some particular property. The decisions are tolerably, if not quite, uniform, that securities of that class are interests in land within the old Act of George II.; whether they are interests in land within the Act of 1888 is, perhaps, a little more doubtful; I say a little more doubtful, because of the omission from that Act of the words "charge or incumbrance;" but we need not decide that. Now we are asked to overrule these decisions. But we are not able to do just whatever we like about overruling. If we find a series of decisions running down from the time of Sir WILLIAM GRANT, we should be very cautious, whatever we might think, and very slow to overrule them. But, in point of fact, that matter is not now of much practical importance because of the Mortmain and Charitable Uses Act of 1891, by which, in the case of a person dying since 5 August, 1891, no question of this sort could arise;

(23) Section 82 of the Leeds Improvement Act, 1877, is as follows:—

"When any land, rents or property is or are sold, demised or otherwise disposed of by the corporation, the same shall, in the hands of any person or body corporate to whom the same shall have been sold, and his or their heirs, executors, administrators, successors and assigns, be absolutely free

from all claims, charges or obligations in respect of any consolidated stock granted or issued under this Act, and such person or body corporate shall not be bound to see to or inquire into the application by the corporation of the money arising from such sale, or be in any way responsible for the non-application thereof."

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obviously, under the Act of 1891, there would be no interest in land here at all; but this case does not come under the operation of the Act of 1891, but under the old *régime*. The case before us, then, does not fall within the first group of cases at all, and, as we need not review that line of cases, the less we say about them the better.

The other class of cases consists of those in which there was a charge on the undertaking, as it may be called; whether it be the undertaking of a commercial or of a municipal body seems to me immaterial for this purpose. The substance is that there is no definite mortgage or assignment of any specific property, but that there is a general charge of the undertaking as a whole. The case before us falls within that group. That group may be said to begin with *Attree v. Hawe* (13), which, notwithstanding what was said by way of comment and qualification in *Ashworth v. Munn* (7), appears to me still to stand good as regards debenture securities on property of this description. That case was followed in *In re Parker, Wignall v. Park* (20), and *In re Yerbury's Estate, Ker v. Dent* (19), and to some extent in *In re Thompson, Bedford v. Teal* (10), and *In re Holmes* (24). These cases all fall within the category of cases where there is given a general charge on the revenue or income of property of a going corporation or undertaking. The decisions as to this are all uniform, and are all one way. They involve no interest in land within the meaning of the old statute of George II. still less within the meaning of the present Act of 1888. If that be so, there is an end of this case. I am satisfied that it falls within the second group which I have mentioned, and not within the group ending with *In re David, Buckley v. Lifeboat Institution* (4).

I think Mr. Justice NORTH was right in his decision, and the appeal must be dismissed.

LOPES, L.J. : This is a charge which is created under section 67 of the Leeds Improvement Act, 1877 (2), and the words indorsed upon the debenture stock certificate are these: [His Lordship read the indorsement on the certificate down to "acquired by them," as set

forth above, and continued :) It seems to me that the all-important point in this case is, what is the true construction of the section of the Act authorizing the creation of the stock and of the indorsement on the certificate. It is important to observe that there is no mortgage of any specific property, no charge of any specific property, no assignment of any specific property; I read the indorsement as saying that there is to be a security to the holder of all the revenues and income of the corporation from whatever source derived. It is a mortgage of the whole undertaking generally.

Then is it within the purview of the Act of 1888? What appears to me is that in that Act which governs the case the words "charge or incumbrance" used in the previous Act are omitted. I cannot help thinking those words were omitted on purpose; for the Act of 1888 is not merely a consolidation Act, but it is an Act to consolidate and amend, and if that is so it confirms the conclusion at which we have arrived.

Adopting the construction I have stated, it appears to me that this debenture stock is to be regarded as in the same position as ordinary railway debenture stock, and is governed by cases such as *In re Parker*, *Wignall v. Park* (20), *In re Yerbury's Estate*, *Ker v. Dent* (19), and *In re Thompson*, *Bedford v. Teal* (10). This decision is not so important as it might have been if the Act of 1891 had not been passed, because if it were a case to which that Act applied it is clear and beyond contest that this certificate could not have been held to confer an interest in land under that Act.

I think Mr. Justice NORTH was right, and this property ought to be considered as pure personalty.

DAVEY, L.J.: A great many cases have been referred to, and properly referred to, in the course of the arguments on both sides and we have had the opportunity and advantage of being taken through the authorities. It is rather difficult at first sight to reconcile them, but I think there are two categories into which they fall; the first is where, according to the true construction of the instrument, there is a general charge on all the general revenues and fruits of the undertaking, and of this class *Attree v. Hawe* (18) may be taken as a type; other cases follow in the same line, which it is not necessary more particularly to mention. It is said that

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Lord Justice JAMES went too far in the view he expressed in *Attree v. Hawe* (13), and it is true that in *Ashworth v. Munn* (7) he corrected some expressions in the judgment of the Court in the earlier case, but I think that correction does not affect the decision which the Court came to in *Attree v. Hawe* (13), that decision, as I take it, being that where there is a general charge on the general revenue or fruits derived from an undertaking it is not a charge which is within the meaning of what is called the Mortmain Act, notwithstanding that that general revenue may be wholly or in part derived from the beneficial use of land.

The second category or class of cases comprises those in which, according to the true construction of the instrument, a charge is created on some specific and particular property, whether that property be the rents of land or tolls of a particular description or other species of profit. Then if any specific subjects of the charge savour of the realty, the security has been held to be within the Act of this class. *In re David, Buckley v. Lifeboat Institution* (4), may be taken as a type of this class of cases, and there are other cases which may be referred to the same category. This distinction, if borne in mind, will, I think, reconcile and put into their proper places the various cases which have been referred to. I lay aside cases like *Ashworth v. Munn* (7), which do not relate to the securities of a corporation of this description; that particular case related to the interest of a partner in a common law partnership, as to which different considerations arise.

If what I have said be sound, the real question in this case must be, what is the construction of the particular document which we have before us? The charge is not contained in the certificate itself—that is only a certificate that the holder is entitled to so much debenture stock created under certain Acts—but the charge is contained in the Leeds Improvement Act, 1877, section 67 of which says that the stock “shall be a charge upon the borough fund, borough rate, the waterworks and gasworks undertakings and the improvement rates and the revenues of all landed and other property vested in or belonging to the corporation respectively derived therefrom, and any other revenue which may be acquired by them.” That language, obviously, sweeps in all revenue

received by the corporation from whatever source. The expression "rents of land" is not used, and, although the point may seem a very fine one, I think that is an important distinction. The phrase is "revenues of all landed and other property vested in or belonging to the corporation respectively derived therefrom, and any other revenue," and, in my opinion, it points to revenue in the hands of the corporation rather than to rents in the hands of tenants payable for the specific use of the property, and I think you may paraphrase it thus: "general revenue of the corporation from every source, including their borough fund, borough rate, waterworks and gasworks undertakings, and their improvement rates, their landed property and revenue of every description." If this be the true meaning of the words, the substance of the charge here is exactly equivalent to that of the charge which the debentures in *Gardner v. London, Chatham and Dover Railway* (25) were held to give, viz. a charge on the fruits of a going concern or undertaking, and, if so, we ought to give the same meaning to this debenture stock as was given in *Attree v. Hawe* (13) and subsequent cases; and, being a charge on the general fruits of the undertaking, there is not conferred a charge which is an interest in land within the meaning of the Mortmain Acts, though in part those fruits are derived from landed property. This construction is to the same effect as that given to the instrument before Mr. Justice CHITTY in *In re Yerbury's Estate, Ker v. Dent* (19); it is, in effect, saying that, whatever the words used, the charge is a general charge on the revenue with a useless and mischievous enumeration of particulars. It is also in accordance with the way in which Lord Justice TURNER and Lord Justice CAIRNS in *Gardner v. London, Chatham and Dover Railway* (25) construed the debenture before them. Whatever words are used, it is a charge only on the fruits of the undertaking.

The appellant's counsel contended that there is no charge of this sort, and that you cannot speak of a general undertaking of a municipal corporation. But I think that argument is idle. I do not see that you can draw any sound distinction between a municipal corporation and a railway company for this purpose. A municipal corporation is a great going concern, if I may so call it,

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for public purposes ; it is endowed by the Legislature with property to be used and applied for public purposes, and it is the intention of the Legislature that it should be a going concern for the benefit of the inhabitants and the neighbourhood just as much as that the London, Chatham and Dover Railway Company, for instance, should be a going concern for the purposes of carrying passengers between London and Dover.

Taking this view, it is not necessary to consider whether *Finch v. Squire* (9) has been or ought to be overruled. In the view I take, the question does not arise, because *Finch v. Squire* (9) must be regarded as coming within the category of the second class of cases to which I have referred, where you have a specific charge upon specific property. Sir WILLIAM GRANT's reasoning in the case seems to me to be of a rather refined character, and *Finch v. Squire* (9) would probably not be decided in the present day in the way it was in 1804. But it is not overruled in *Attree v. Hawe* (13), because that case does not touch the same class of cases.

I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors : *Torr, Janeway, Oddie & Sinclair*, for *Stewart, Son & Chalker*, Wakefield.

Patersons, Snow, Bloxam & Kinder, for *Dibb & Co.*,
Leeds.

Pitman & Sons, for *Emsley, Son & Smith*, Leeds.

NUTTER v. HOLLAND.

1894, August 2. LINDLEY, LOPES AND DAVEY, L.JJ.

Practice—Payment into Court—Money “in the hands” of Executors or Trustees—Money parted with before Application—Rules of the Palatine Court, Order XLVIII. r. 3 (d)—R. S. C., 1883, Order LV. r. 3 (d).

Although trustees or executors are proved to have received trust money, and have not properly discharged themselves thereof, an order for payment of the money into Court cannot be made upon them under R. S. C., 1883, Order LV. r. 3 (d) (or Order XLVIII. r. 3 (d) of the Palatine Rules, which is in the same terms), unless when the application is made the money is actually in their hands.

In re Chapman, Fardell v. Chapman (1), disapproved.

APPEAL from the Vice-Chancellor of the Palatine Court of Lancaster.

The plaintiff and the defendant were the trustees of the will (dated 30 June, 1881) of Alice Nutter, who died on 1 March, 1886. The plaintiff was also a beneficiary under the will. The defendant was a solicitor, and his firm got in the estate of the testatrix. According to an account delivered by the defendant on 8 September, 1886, the sum available for division was 1,289*l.* 8*s.* 9*d.* The balance, after giving credit to the defendant for certain sums subsequently paid by him to some of the beneficiaries and into a bank, was 809*l.* 11*s.* 6*d.* On 31 May, 1892, the defendant was adjudicated a bankrupt.

By an originating motion under Order XLVIII. r. 3 (d) of the Palatine Court (which is in the same terms as Order LV. r. 3 (d) of the Rules of the Supreme Court, 1883), the plaintiff asked that the defendant might be ordered to pay into Court the sum of 809*l.* 11*s.* 6*d.*, or that such other order might be made as the Court thought fit. In opposition to the motion, the defendant swore an affidavit showing that the greater part of the money so received by him was represented by investments. On 12 April, 1894, the Vice-Chancellor refused the motion without costs. The plaintiff appealed.

Hopkinson, Q.C., and T. E. Mansfield, for the appellant.

Cozens-Hardy, Q.C., and *Whinney*, for the respondent, took the preliminary objection that what was asked for could not be done on originating summons or motion under the rule in question.

Hopkinson, Q.C., and *T. E. Mansfield*, for the appellant :

The Vice-Chancellor proceeded on a misreading of Lord MACNAGHTEN's remarks in *Dowse v. Gorton* (2). Nothing in those remarks is applicable here, and that case is no authority against us. The account delivered by the respondent trustee in 1886 clearly shows that 809*l.* was then due by him. The money, therefore, is shown to have come to his hands, and as there is nothing to discharge him of it, it is still, in legal contemplation, "in his hands."

[LOPES, L.J., referred to *Hollis v. Burton* (3).]

DAVEY, L.J. : *In re Chapman*, *Fardell v. Chapman* (1), is in your favour.

LINDLEY, L.J. : I do not like the expression "in their hands in the view of the law." A trustee who has improperly parted with trust money cannot obtain any benefit from not having it, but he has not got it.]

On that view, if a trustee spends the money, and tells us he still has it, and then when we take proceedings under this rule, proves that he has parted with it, we must fail ; while if we proceed by writ we shall be told we have incurred unnecessary expense.

[LINDLEY, L.J. : *In re Weall*, *Andrews v. Weall* (4), is a decision on the point since *In re Chapman* (1).]

A trustee is estopped from saying that he has spent trust moneys received by him otherwise than *bonâ fide* for the purposes of the trust.

If what we want cannot be done under this rule, we are entitled to an order for administration of the trust under the rule corresponding to R. S. C., Order LV. r. 4 (c). In that way we can get

(2) [1891] A. C. 190 ; 60 L. J. Ch. 745 ; 64 L. T. 809 ; 40 W. R. 17.

(3) [1892] 3 Ch. 226 ; 67 L. T. 146 ; 40 W. R. 610.

(4) 37 W. R. 779.

an order for payment into Court whether the respondent has the money or not.

Whinney asked that if an order was to be made under Rule 4 (c), the case might be remitted to the Palatine Court to have the accounts taken.

LINDLEY, L.J.: The summons, or rather the notice of motion, in the Palatine Court, with which the Vice-Chancellor has dealt, is as follows: [The Lord Justice read the notice of motion, and continued:] Now that proceeds upon the assumption that there is money in his hands, and it is evidently based upon the rule which corresponds to Order LV. r. 8 (d), of the Judicature Rules. That rule is as follows: [The Lord Justice read Order LV. r. 8 (d), and continued:] The rule means what it says. It is a provision for payment into Court of money in the hands of executors and trustees, and if the money is not in their hands, although they may be responsible for it, that rule does not apply. I think Lord Justice KAY went too far in *In re Chapman, Fardell v. Chapman* (1), when he ordered the defendants to pay into Court 7,000*l.* which was not in their hands. The rule is limited to cases where the money is in their hands. Those cases may be of different kinds. Executors or trustees may have money in their hands and want to get rid of it; and the rule also includes cases where they have got money which is at risk, and the *cestuis que trustent* want to secure it. But I do not think it is legitimate under that rule to come into Court for an order upon trustees or executors to pay into Court money which they have not got. It appears to me that the Vice-Chancellor was right in making no order upon that motion. What I think he might have done, and what I think we ought now to do, is this. This is obviously a case for the administration of the trusts of the will, and one in which the accounts may very likely be waived. If a summons is taken out for the administration of the trusts under Order LV. r. 4 (c), or the corresponding rule, the result will be that there will be a finding, not that the trustee has money in his hands, but that he is to be charged with money which he had in his hands and has improperly parted with. It strikes me the right course will be this: to vary the order of the Vice-Chancellor, and refer the matter back to the Palatine Court in order that an account may be

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taken; and to make an order at the request and at the risk of the defendant for the administration of the trust (not of the estate).

LOPES, L.J. : I am of the same opinion. [The Lord Justice dealt with the form of the order which ought to be made, and continued :] There is only one other matter I wish to say a few words about, and that is with regard to the construction to be put upon Rule 3 (d) of Order LV. The words of that rule are these : [The Lord Justice read the rule, and continued :] I entirely agree with what has been said, that this rule means what it says, namely, money actually in the hands of the executors or trustees. In the case of *In re Chapman* (1), Mr. Justice KAY (as he was then) seems to have thought that an order might be made for payment into Court of money improperly applied by the trustees. I think that was putting a construction on this rule which it does not properly bear.

DAVEY, L.J. : I agree. I would only say one or two words as to the construction of Rule 3 (d) of Order LV., which, I understand, is in identical terms with the corresponding rule of the Palatine order upon which this original motion was founded. I agree with what has already been said, that "payment into Court of moneys in the hands of executors or trustees" means what it says. You must show that the defendants have money in their hands applicable to the trust. I am not going to answer any of the riddles which *Mr. Hopkinson* proposed to us as to whether money would be "in the hands" of trustees or executors in the particular cases which he put. These will be dealt with by the Court when they arise. But what I do say is this, that it does not mean money which may or may not be ultimately found due from the defendants when the facts have been gone into.

On the other point, I agree that this summons, or motion rather, in the form in which it asked for payment into Court, was not in the right form. It ought to have asked for administration of the trust, and then, if the *cestuis que trustent* were prepared to waive the account, and the defendant did not insist upon the account, the Court might proceed to do what it would do in an ordinary case if that course were taken : direct payment into Court by the defendant of the balance found due from him.

But I think the plaintiff ought to be put in the same position as if he had expressly asked for that order, because he asked for such further or other order as the Court might think proper to make, and the rule would enable us to make such order as we think the circumstances of the case require. I agree with the order which has been proposed by Lord Justice LINDLEY.

Order varied.

Solicitors : *James Craven*, Preston, for the Appellant.

F. A. K. Doyle, for *R. J. N. Parker*, Blackburn, for the Respondent.

IN RE WOOD, TULLETT v. COLVILLE.

1894, *July* 31. LINDLEY, LOPES AND DAVEY, L.JJ.

Will—Construction—Remoteness—Perpetuity—Residue—Child of Child dead at Date of Will.

A testator directed his trustees to carry on his gravel-pits till they were worked out, and then to sell them and hold the proceeds of sale in trust for "such child or children of mine then living and such issue living of any child or children then deceased, as shall being a son or sons attain the age of twenty-one years, or being a daughter or daughters attain that age or marry," the issue to take *per stirpes* :—

Held, that the trust for sale and the gift of the proceeds were void for remoteness; and evidence of probability as to the time within which the pits would be worked out after the testator's death is inadmissible.

Jee v. Audley (1) followed.

The testator gave his residuary estate upon trust to divide the income thereof "equally amongst all my children during their respective lives, and from the death of any such child whether before or after my death" to hold the *corpus* upon trust for "all or any the child or children of such child who being a son or sons attain the age of twenty-one years or being a daughter or daughters attain that age or marry :"—

Held, that the child of a child dead at the date of the will did not take.

Christopherson v. Naylor (2), *In re Chinery*, *Chinery v. Hill* (3), and *In re Musther*, *Groves v. Musther* (4), followed.

APPEAL from *Kekewich*, J. (5).

William Wood, by his will dated 29 February, 1872, after making

- (1) 1 Cox, 324; 1 R. R. 46.
- (2) 1 Mer. 320; 15 R. R. 120.
- (3) 39 Ch. D. 614; 57 L. J. Ch. 804; 59 L. T. 303.
- (4) 43 Ch. D. 569; 59 L. J. Ch. 296.
- (5) [1894] 2 Ch. 310; 63 L. J. Ch. 544.

certain bequests, proceeded as follows: "I devise and bequeath all my real estate, and all the residue of my personal estate, unto and to the use of William Tullett and George Wood, their heirs, executors, and administrators, upon trust to dispose thereof, according to the direction hereinafter contained concerning the same; that is to say, I direct my trustees to carry on my said business of a gravel contractor until my gravel-pits are worked out, and then to sell the said gravel-pits and the freehold land on which the same are situate, and the horses, carts, and other stock-in-trade employed in the same, by public auction, either together or in lots, and subject to such conditions and generally in such manner as my trustees may think expedient, with full power for my sons or any of them to bid at such sale. And I direct my trustees to hold the proceeds of such sale in trust for such child or children of mine then living, and such issue living of any child or children then deceased, as shall being a son or sons attain the age of twenty-one years, or being a daughter or daughters attain that age or marry, in equal shares, but so that the issue of my deceased children may take the share or the respective shares only that the parent or respective parents would have taken if living. And it is my wish and intention that, until such sale as aforesaid, my sons, or such of them as may be willing to do so, shall continue to be employed in the said business as heretofore, at the usual wages."

And after various other directions to his trustees, the testator continued as follows: "And as to all the residue of my real and personal estate, I direct my trustees to hold the same upon trust that they shall in such manner and under such stipulations and upon such terms and conditions in all respects as they think fit, sell, collect, or otherwise convert into money, (according to the nature of the premises,) all such parts of the same premises as do not consist of ready money. . . . And shall with and out of the moneys to be produced by such sale, collection, and conversion, and the ready money of which I may be possessed at my death, pay my funeral and testamentary expenses, debts, and legacies (other than specific legacies), and shall invest the residue of the same moneys in the names or under the legal control of my trustees, . . . with power for my trustees to vary or transpose the investment of the same trust premises at their discretion, and shall pay and divide

the income of the said trust premises amongst all my children during their respective lives, . . . and shall upon and from the death of any such child, whether before or after my death, hold the *corpus* whereof the income is, or would have been, payable to such child, upon trust for all or any the child or children of such child who being a son or sons attain the age of twenty-one years, or being a daughter or daughters attain that age or marry under that age, and if more than one, in equal shares."

The testator appointed his trustees, William Tullett and George Wood, to be executors of his will.

The testator died on 24 March, 1872.

The will was proved on 18 April following by the executors therein named.

On 15 July, 1898, the executors and trustees took out an originating summons for the determination of the following questions, arising in the administration of the testator's estate: (i.) whether, upon the true construction of the will, the children of Harriet Colville, a daughter of the testator, who died in his lifetime, and before the date of the will, were entitled (subject to their attaining twenty-one if males, or attaining twenty-one or marrying if females) to share in the proceeds of sale of the gravel-pits and the freehold land upon which the same were situate, and the horses, carts, and other stock-in-trade employed in the same, directed to be sold by the testator on the gravel-pits being worked out; and (ii.) whether the children of Harriet Colville were entitled (subject as aforesaid) to share in the proceeds of the conversion of the testator's ultimate residuary estate.

It appeared that the gravel-pits, when acquired by the testator, were some six acres in extent, and there remained unworked out at his death about half an acre. This half-acre, it was estimated, would, according to the usual course of working, take from eighteen months to three years to work out, according as the men employed worked ten or eight hours a day. They were, in fact, worked out in or about the month of May, 1878.

On 5 April, 1894, KEKEWICH, J., made an order declaring that the bequest of the proceeds of sale of the testator's gravel-pits, freehold land, horses, carts, and other stock-in-trade employed in the same, was void as infringing the rule against perpetuities, and

that such property passed under the devise and bequest of the testator's ultimate residuary estate, and that upon the true construction of the will the children of Harriet Colville were not entitled to share in the proceeds of the conversion of the testator's ultimate residuary estate.

A son of Harriet Colville appealed.

Cozens-Hardy, Q.C., and Rowden, for the appellant :

KEKEWICH, J., was wrong in holding the gift was void for remoteness.

The evidence that, with ordinary working in the way in which the testator had worked the pits, they would be worked out within three or four years of the testator's death, and that, in fact, they were worked out within about six, is admissible as ancillary to the question of construction. KEKEWICH, J., did not object to or deal with it on the question of its admissibility. *In re Dawson, Johnston v. Hill* (6), which was cited below on the other side, deals with a special case, viz. childbearing and possibility of issue, to which special considerations are applicable; so it is not in point here.

The two clauses in the will, giving the sons leave to bid at the sale, and expressing the wish that they should, till the sale, continue to be employed in the business, are equivalent to a direction that the sale should take place in the life of the sons; the trust for sale was therefore good: *Lachlan v. Reynolds* (7).

As to the gift of the proceeds, KEKEWICH, J., said that the unfortunate words "then living" were fatal. But if the testator had himself worked out the gravel-pits in his lifetime, so that it became the immediate duty of the trustees to sell, the Court would have admitted evidence of that fact, and evidence as to their being subsequently worked out is also admissible. The class to take is a good class, as being ascertainable within the necessary limit of time, and the fact that the proportionate shares cannot be ascertained is not fatal.

[DAVEY, L.J.: That argument will not do: per Lord SELBORNE in *Pearks v. Moseley* (8).]

(6) 39 Ch. D. 155; 57 L. J. Ch. 1061; 59 L. T. 725; 37 W. R. 51.

(7) 9 Hare, 796.

(8) 5 App. Cas. 714, 723; 50 L. J. Ch. 57, 61; 43 L. T. 449, 451; 29 W. R. 1, 3.

LINDLEY, L.J. : It is old law that the shares as well as the class must be ascertained within the period.]

We admit that *Curtis v. Lukin* (9) does go to that. *In re Daveron, Bowen v. Churchill* (10), is a case where the class could be ascertained within the necessary period.

[They also referred to *Wood v. Drew* (11).]

But if the gift fails, it falls into the residuary estate, and the appellant takes a share of that: *In re Lucas' Will* (12).

[On this point, *In re Chinery, Chinery v. Hill* (3), and *In re Musther, Groves v. Musther* (4) were referred to.]

Warrington and Benn, respectively representing other persons, and *C. E. E. Jenkins*, for the executors and trustees, were not called upon to argue.

LINDLEY, L.J. : The question in this case is entirely one of the construction of the will of a testator who owned some gravel-pits. There are two questions : first, whether the gift of the proceeds of sale of the gravel-pits in trust for such child or children of the testator then living, and such issue living of any child or children then deceased, as should being a son or sons attain the age of twenty-one years, or being a daughter or daughters attain that age or marry, is void on the ground of the rule against perpetuities ; and, second, if it is, whether the appellant, who is a child of a daughter of the testator who had died before the date of the will, can have a share of such proceeds as part of the residuary estate.

By his will the testator devised and bequeathed as follows : [His Lordship read a portion of the will, concluding with the words, "at the usual wages," as set forth above, and proceeded :] The first question is, whether the direction there given to sell the gravel-pits and divide the proceeds of sale, as therein specified, is void as being contrary to the rule against perpetuities. The appellant contended that it was reasonably clear, without any external evidence, that the

(9) 5 Beav. 147 ; 11 L. J. Ch. 380.

(10) 3 R. 685 ; [1893] 3 Ch. 421 ; 63 L. J. Ch. 54 ; 69 L. T. 752 ; 42 W. R. 24.

(11) 33 Beav. 610, 614.

(12) 17 Ch. D. 788 ; 29 W. R. 860.

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sale of the gravel-pits would necessarily take place within the lifetime of a son or sons of the testator and twenty-one years after, and he relied upon the power for the sons, or any of them, to bid at the sale, and the expression of the testator's wish that until the sale his sons, or such of them as might be willing to do so, should continue to be employed in the business at the usual wages, as showing that. I think that the argument resting on those clauses is untenable; they do not at all show that the sale must take place within a life or lives in being and twenty-one years.

Then we come to the more difficult question, whether the gravel-pits, being nearly worked out at the testator's death, and being actually worked out within six years or so after, evidence of that is admissible and the rule against perpetuities avoided. I think the view taken by Mr. Justice KEKEWICH was right. The principle is clearly stated by Mr. Theobald in his book on Wills, 3rd edit. p. 401, where he says: "In applying the rule against perpetuities, the state of things existing at the testator's death, and not at the date of the will, must be looked at. But possible and not actual events are to be considered, and, therefore, if at the testator's death a gift might possibly not have vested within the proper time, it will not be good, because as a matter of fact it did so vest;" and the learned author refers to *Dungannon v. Smith* (13). We have been referred to *In re Dawson*, *Johnston v. Hill* (6), where the cases were reviewed by Mr. Justice CHITTY. The rule that possible and not actual events are to be considered is as old as *Jee v. Audley* (1), in the time of Lord KENYON. If that be so, there is an end of the case as regards perpetuity. It is the possibility which governs the question. Unless the trust for sale, or the time of distribution, necessarily arises within the limit of time, the rule applies and the gift fails. The gift here is "in trust for such child or children of mine, then living, and such issue living of any child or children then deceased," and it is void for perpetuity because it is a gift to a class which may not be ascertained within the period allowed by the rule against perpetuities. This is a case in which the trust for sale and the gift of the proceeds are both void on the ground of perpetuity.

Thus the gift falls into the residuary estate, and the next question is, Can the appellant share in the residuary gift? The words of the will are: [His Lordship read a portion of the will, commencing at "And as to all the residue of my real and personal estate," and concluding with "being a daughter or daughters attain that age or marry under that age," and continued:] The appellant is a son of a daughter of the testator who was dead at the date of the will. It is not the case of a child of a child who died between the date of the will and the death of the testator. Bearing that in mind, let us look again at the will: the trust is to divide the income "amongst all my children during their respective lives," and so on; that cannot apply to the child of a son or daughter who was dead at the time the will was made. The appellant's mother was then dead, and it is impossible to make her to be included within the description of that clause. Apart, therefore, from all authority, the appellant cannot bring himself within the benefit of that trust.

If we look at the authorities, I think, with all deference to the view of Vice-Chancellor MALINS in *In re Lucas' Will* (12) and *In re Potter's Trust* (14), that this case is governed by *Christopherson v. Naylor* (2), *In re Musther*, *Groves v. Musther* (4), and *In re Chinery, Chinery v. Hill* (3).

The appeal must therefore be dismissed.

LOPES, L.J.: I am of the same opinion, and I think the decision of Mr. Justice KEKEWICH was correct.

The trust for sale was, in my opinion, too remote. In order to be valid, the trust must necessarily arise within a life in being and twenty-one years. I think the gift of the proceeds of sale to the beneficiaries is also too remote. It is impossible that the members of the class to take should necessarily be ascertained within the proper period. The gift is to a child or children "then living, and the issue living of any such child or children then deceased." Now no one can say when the gravel-pits would be worked out; that is an indefinite fact, therefore you have it both indefinite when the time of sale would come, and, in consequence, indefinite who the class to take would be. It is said that evidence as to the time of

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working out the pits can be taken into consideration; but I do not think it can.

Then as to the residuary estate; I do not think the appellant can take a share. The words of the will are too strong for him.

I agree that the appeal must be dismissed.

DAVEY, L.J.: I am of the same opinion. I agree with the reasons which have been already given for holding that the trust for sale and the gift of the proceeds are void for remoteness. The law is that, if there is a possibility that the trust will not arise, and the persons to take will not be fixed, within the limited period allowed by the rule against perpetuities, the trust and gift are too remote, and the Court is not entitled to speculate upon probabilities or improbabilities, or to act upon facts as they may turn out afterwards. The appellant's counsel says that the Court may have evidence of actual facts. I agree; but it must be evidence only of facts, and not of opinion or of probabilities such as he asks us to consider. It may be that the gravel-pits would not be worked out within the necessary period; on the other hand, it may be that there was a very high degree of probability that they would. But the Court cannot take probabilities into account. It may be that, if the pits had been actually worked out in the lifetime of the testator, the gift would have been good, the trust for sale would have arisen at once, and evidence of the fact would have been admissible. But that is totally different; in that case it would be evidence of a fact, not of probability.

As to the residuary gift, in my opinion the question is covered by authority. Lord Justice LINDLEY has referred to *In re Chinery*, *Chinery v. Hill* (3), *In re Musther*, *Musther v. Groves* (4), and *Christopherson v. Naylor* (2). *In re Chinery*, *Chinery v. Hill* (3) is very like the present case; there the residuary gift was in trust for the testator's nieces for their lives, and after the death of each niece her share was to be paid to such of her children as she should by will appoint, and in default of appointment, to her children equally; and then there was an express clause, "If any niece shall die in my lifetime, her share shall be for the benefit of her child or children," and Mr. Justice STIRLING held that the child

of a niece who died before the date of the will did not take. The words used by the testator in that case are not identical with the words we have in the present case, but I am unable to distinguish one case from the other in principle. *Christopherson v. Naylor* (2) was a case of substitution, but the principle is the same in each case. The case of the substitution of children for their father or mother, if dead at the time when the gift is to take effect, is the same thing as a gift to a person for life, with remainder to his children, with a proviso that the children are to take, notwithstanding the death of the parent before the gift takes effect, which is the substance of what the testator has said in the present case. Notwithstanding what was said by Vice-Chancellor MALINS in *In re Potter's Trust* (14) and *In re Lucas' Will* (12), I think that *Christopherson v. Naylor* (2) was rightly decided, and should be followed. It was so regarded by the Court of Appeal in future cases, including *In re Musther*, *Groves v. Musther* (4).

But, putting aside authority, I am of opinion that I should come to the same conclusion upon this will as I should upon authority. The testator, after directing conversion of all his residuary estate and payment of his funeral and testamentary expenses and debts and legacies out of the proceeds, directs that the income of the surplus shall be divided "equally amongst all my children during their respective lives," and so on. That must, in my opinion, mean children who at the date of the will were capable of taking a life interest, and must therefore mean children living at that time. It would be forcing the meaning to hold that it included a child who was dead at the time and incapable of benefiting by the testator's bounty.

I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Pownall & Co.*, for the Appellant.

Snow, Snow & Fox, for the other parties.

IN RE R. BOLTON & CO., SALISBURY-JONES', AND
DALE'S CASE.

1894, July 26, 27. LORD HERSCHELL, L.C., AND LINDLEY AND
DAVEY, L.JJ.

*Company—Director—Articles of Association—Share Qualification—Resignation
before the obligation to take shares has arisen—Implied Agreement.*

Where by the articles of association of a company it is provided that directors who do not acquire their qualification shares within a specified period (*e.g.* three months) from their appointment shall be deemed to have agreed to take such shares from the company, directors who do not acquire the qualification, and resign within the time so limited, are under no obligation to take shares from the company, and cannot be placed on the list of contributories in respect of any agreement implied by the articles. (LINDLEY, L.J., dissenting.)

APPEAL from Wright, J.

The above-named company was incorporated on 22 April, 1893. The applicants and certain other persons were subscribers to the memorandum of association, and became under the rules the first directors of the company.

Article 91 of the company was in the following terms: "The qualification of a director shall be the holding of shares of the company of the nominal amount of 100*l.* in ordinary or preference shares. A director may act before acquiring his qualification, but shall in any case acquire the same within three months from his appointment, and unless he shall do so he shall be deemed to have agreed to take the said shares from the company, and the same shall be forthwith allotted to him accordingly."

Article 94 provided that "the office of a director shall be vacated (*b*) if by notice in writing to the company he resigns his office."

The applicants were on the register for one share each as subscribers of the memorandum, but no other shares had been allotted to them. They resigned by notice in writing on 29 June, 1893. On 31 January, 1894, the company was ordered to be wound up. The official receiver, acting as liquidator, placed the applicants' names on the list of contributories for twenty 5*l.* shares each, in addition to the one share each already mentioned. The applicants

took out a summons to have their names removed from the list in respect of such twenty shares. On 9 June, 1894, WRIGHT, J., refused their application.

The applicants appealed.

Rufus D. Isaacs, for the appellants :

Our contract to take shares from the company was only inchoate until the three months had expired. Before that we had resigned, so that it never became absolute.

[He cited *Isaacs' case* (1), *In re Wheal Buller Consols, Ex parte Jobling* (2), *In re Colombia Chemical Factory, &c., Hewitt's and Brett's cases* (3), *In re Hercynia Copper Co.* (4), and *In re Printing Telegraph Co. of Agence Havas, Ex parte Cammell* (5).]

O. L. Clare, for the respondent (the official receiver) :

[Lord HERSCHELL, L.C. : If a director died within the three months, must his executors buy the twenty shares simply to sell them again, benefiting nobody but the broker ?]

Yes. If he died just after the expiration of the three months, it is clear they must. If I am wrong, the directors need never qualify. They might act for two months and twenty-nine days, and then resign, to be re-elected two days after, and so on. They could arrange so that some were always left in office to carry on the business of the company. The object of the article is to ensure that a director shall have a stake in the company.

Isaacs, in reply :

If the meaning is doubtful, the agreement ought not to be construed so as to impose a liability.

[LINDLEY, L.J. : Was it ever intended to have directors who would not come under an obligation to take shares ?]

(1) [1892] 2 Ch. 158; 61 L. J. Ch. 481; 66 L. T. 593; 40 W. R. 518.

(2) 38 Ch. D. 42; 57 L. J. Ch. 333; 58 L. T. 823; 36 W. R. 723.

(3) 25 Ch. D. 283; 53 L. J. Ch. 343; 49 L. T. 479; 32 W. R. 234.

(4) 7 B. 214; [1894] 2 Ch. 403; 63 L. J. Ch. 567; 70 L. T. 709; 42 W. R. 593.

(5) 7 B. 191; [1894] 2 Ch. 392; 63 L. J. Ch. 536; 70 L. T. 705.

Yes, provided they did not act for more than three months. The shares to be taken are qualification shares, and therefore there can be no obligation on a person not a director to take them.

LORD HERSCHELL, L.C. : The question in this case turns upon the construction of the 91st article of association of this company. I think it must be admitted that it is not possible, in any point of view, to put a thoroughly satisfactory construction on that article. If it were construed as *Mr. Clare*, for the respondent, contends, it certainly does not carry out effectively that which he says is its object. Article 89 provided that certain persons, some of whom are now in question, should be the first directors of the company, and should continue to be directors till they, or a majority of them, should nominate other directors in place of those subscribers.

Then comes article 91. [His Lordship read the article, and continued:] Now, the question is whether the appellants in this case have agreed to take the shares from the company. It is admitted upon the authorities that, unless these last words are applicable, although a person might have acted as a director not only for the period of three months, but beyond the period of three months, there would be no obligation such as would sanction putting him upon the list of contributories. The sole question to be determined is whether these words are applicable to the present appellants. I think it cannot be doubted that, if the present appellants had continued to act for more than the three months here referred to, and had not otherwise acquired shares, they would be taken to have agreed to take them from the company, and would be properly put on the list of contributories. But the difficulty arises in this case from the fact that they did not act as directors even down to the expiration of that period. Now, in these circumstances, are they in the position of being deemed to have agreed to take the shares from the company? It must be borne in mind that the qualification of a director is the holding of shares in the company. It is not acquiring shares that is described as the qualification, but holding them. Undoubtedly when a certain qualification is prescribed it is the duty of the director not merely to acquire but to hold, and unless he does so he cannot be said to be a qualified

director. But then, notwithstanding that he must be the holder of a certain number of shares in the company, and the holder of such shares during the whole time that he is a director, this article provides that he may act before acquiring his qualification, "but shall in any case acquire the same within three months from his appointment." Now, that appears to me to be designed to indicate that, although he must, to be a qualified director, hold a certain number of shares in the company, he may postpone for a time the acquiring of that holding, and still have all the rights of a director. He may postpone it for a period of three months, but not longer. When that period has expired, he is bound to acquire and continue holding the prescribed number of shares. He cannot be a qualified director otherwise. The question here is, whether a person who becomes a director, but who before the three months has expired has ceased to be a director, is bound then either to acquire the shares, or if he does not acquire them must be deemed to agree to take them from the company. In language, the primary obligation is to acquire. It is only unless he does that that he is to be deemed to agree to take them from the company. Well, now, in the provision relating to acquiring the words are that he may act before acquiring his qualification, but shall in any case acquire the same within three months from his appointment. Now, was it the intention to require a person who had ceased to be a director to acquire his qualification? Well, he could not acquire his qualification. He could acquire the qualifying number of shares, but in my view it is not a mere verbal difference, because the object the article is dealing with is to secure the holding of a particular qualification by a director who is acting and managing the affairs of the company. It is not the object to place a certain number of shares. If that were the object it certainly is not carried out. The only effect it would have if a person who ceased to be a director within the three months were obliged to acquire the qualifying number of shares is that, although the shares would not qualify him, yet he must be supposed to have entered into an obligation to go into the market and buy that number of shares, though he might, of course, sell them the moment after. As regards a person who has ceased to be a director, there is no duty to hold the shares. Can it therefore be contended that he should buy shares in the market

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merely to comply with the words "acquire his qualification"? It seems to me that that really was not the intention of this article. If it were an article providing that every person who became a director should necessarily have allotted to him, if he were not otherwise on the register, a certain number of shares, and should necessarily hold them for a certain length of time, I should be inclined to give effect to that. I think there is a great deal to be said for enforcing stringently an article that all persons who become directors in a company shall be deemed to have agreed to take a certain number of shares. If there were an article using apt language to carry that out, it would find in me one thoroughly disposed to give effect to it, because I feel the evil of persons who are acting as directors of a company having no stake in it, or being able to part immediately with any stake they have. But that does not seem to be provided for here, even on the view of the respondent. He contends that the language used would be satisfied by going into the market, buying a certain number of shares, and immediately selling them. No advantage would result to the company from an obligation of that sort, for it is only if he fails to acquire the same within three months that he is to be deemed to have agreed to take shares from the company.

Where I differ from the learned Judge below is that he asks whether their having resigned within three months discharges the obligation they have entered into. I should regard it not as a discharge, but as something which prevents the obligation from ever arising. I differ from the learned Judge because I do not construe these words at the end of the article as importing an agreement to take shares by a person who at the time when the agreement would come into operation has ceased to be a director. I think, therefore, that the appeal should be allowed.

LINDLEY, L.J.: I have the misfortune to differ from the opinion which has just been expressed by the Lord Chancellor. I agree that the question turns upon the true construction of the articles. The Lord Chancellor has read the articles, and I will not read them again. The first question is, what is the meaning of the expression "a director"? As I understand these articles, a director is a

person who assents to become, and who does become, a director. It is not necessary that he should retain that character for any definite time. He can retire next day, and he can resign his shares next day. Article 91 provides that "the qualification of a director shall be the holding of shares of the company of the nominal amount of 100l." Well, of course, a director cannot hold the shares unless he acquires them. This article imposes the necessity of holding as long as he is a director. The qualification of a director is to hold 100 shares, and that really means to acquire and hold. It is further provided [the Lord Justice read the rest of the article, and continued:] That, as I understand it, means that a person who has become a director, whenever he may cease to act, shall acquire the shares necessary to qualify him within three months of his appointment, and unless he shall do so shall be deemed to have agreed to take the said shares from the company. That appears to me to be the natural and not a forced construction of these articles, and I think there is sense in that. The real substance of it is that the company say, "We do not wish to have persons as directors who will not come under an obligation to take shares if they become directors."

It follows that I think the appeal ought to be dismissed.

DAVEY, L.J. : This question is, in my opinion, exclusively one of the construction of this article. The earlier cases which have been very properly referred to are only of importance as showing, first, that you must find, to fix a director as a contributory in respect of certain shares, a contract by the director to take those shares within the meaning of section 23 of the Companies Act, 1862; and, secondly, that the articles, although they do not themselves constitute a contract between the director and the company, are evidence of the terms upon which the director has contracted with the company to become a director. I agree with the learned Judge that, if these gentlemen can be shown to have entered into an absolute contract to take shares, or a contract conditional on an event which has happened, they did not relieve themselves of that obligation by resigning their position as directors. But the real question is whether they are in that position. What was their contract? Their contract is, primarily,

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that they will hold shares to the nominal amount of 100*l.* so long as they remain directors, or, in other words, that they will not act except so long as they hold that amount of shares. But that primary obligation is qualified by this, that for three months they may act without acquiring or holding their qualification. The obligation to acquire is only ancillary to the obligation to hold—which, in the face of it, is the primary obligation—and is for the purpose only of enabling the directors to fulfil that primary obligation. Now, when a director resigns, he ceases to be under any obligation to hold the qualifying shares, and if he has not already acquired such shares, he has no need to acquire them. That, of course, if he has entered into a contract to take a certain number of shares, will not relieve him of his obligation. In this case there is, in my opinion, no absolute contract to take shares from the company. The contract to take shares from the company arises only if a director has not acquired his qualification *aliunde*. Looking to the purpose of the articles, I think these words must be construed strictly, and that the word “qualification” must mean shares to be used as a qualification and to be held for the purpose of enabling the director to act as a director. The contract, therefore, is that, in default of acquiring his qualification *aliunde*, he will take it from the company. But if at the end of the three months, when that obligation arises, he is no longer under any obligation to hold his qualifying shares, then he is under no obligation to acquire these qualifying shares, and he is in no default, and the contract with the company has not in that event arisen.

On these grounds of construction I interpret these articles differently from the way in which the learned Judge apparently construed them, and I agree with the Lord Chancellor that this appeal ought to be allowed.

Appeal allowed.

Solicitors : *Russell & Arnholz*, for the Appellants.

Firth & Co., for the Respondent.

NEVILLE v. MATTHEWMAN.

1894, July 25. LORD HERSCHELL, L.C., AND LINDLEY AND DAVEY, L.JJ.

Practice—Payment into Court—Admission.

On an application for an order for payment of money into Court, the Court will not extend the doctrine of admissions that the defendant has the money in his hands further than it was carried in *Freeman v. Cox* (1), where an affidavit of the plaintiff charging that the defendant had the money in his hands, not answered by the defendant, was held sufficient to justify an order.

APPEAL from Chitty, J.

William Matthewman, by his will, dated 16 October, 1872, gave to his wife during her widowhood an annual sum of 52*l.* to be paid to her by weekly or such other instalments as his executors should think fit. He gave to his executors the sum of 1,000*l.* upon trust to invest the same upon Government, real or leasehold securities, or upon the bonds, debentures, or debenture stock of any railway company or municipal body, with power to vary such securities, and to stand possessed of the income thereof upon trust during the minority of his daughter Beatrice Mary Byram Matthewman, to pay to his wife such income by weekly or other instalments for the maintenance, education and benefit of his daughter, but on his daughter marrying or attaining twenty-one to pay the entire income resulting from the 1,000*l.* to his daughter during her life, for her separate use, and after her decease to stand possessed of the principal sum for the children of his daughter, as she should by deed or will appoint, and in default of appointment for such children who should attain twenty-one or marry, equally. He appointed his brother John Matthewman and the defendant executors.

The testator died on 14 November, 1872, and his will was proved by the executors on 14 December following. John Matthewman took no further active part in the administration of the testator's estate, and died on 25 September, 1892.

Prior to and up to the time of his death the testator was carrying on business, and after his death the defendant continued to carry it on, at first for the benefit of his younger brother (till he attained

(1) 8 Ch. D. 148; 47 L. J. Ch. 560; 26 W. R. 689.

twenty-one) and himself, pursuant to the testator's directions, and afterwards for himself alone as residuary legatee. During all that time he regularly paid a sum of 52*l.* a year to the testator's widow up to the time of her death in April, 1893, and 50*l.* a year to the testator's daughter down to August, 1893 (and subsequently at the rate of 40*l.* a year to November, 1893), as equivalent to the interest on the 1,000*l.* On 3 March, 1892, a firm of solicitors wrote to him on behalf of the daughter, saying that they "had been consulted by Mrs. Neville," that is, the daughter, who was married to a Mr. Neville, "as to her life interest in the sum of 1,000*l.* directed to be invested under the testator's will, and were instructed to apply to him for immediate payment of arrears of income then due to her, and to inform him that unless the amount were remitted to them they had instructions to take such steps to recover the same as might be deemed advisable." Upon that the defendant sent to Mrs. Neville a cheque for 2*l.* 4*s.* 2*d.*, "for balance due as per particulars herewith: Interest, 10*l.*, less your share of funeral expenses, 7*l.* 15*s.* 10*d.*" Mrs. Neville's solicitors replied on her behalf on 12 March that Mrs. Neville "declined to accept" the cheque for 2*l.* 4*s.* 2*d.*, which they returned, and that she "denied any liability whatever in respect of funeral expenses claimed to be deducted by him from her income payable to her, and objected to the amount of such income being reduced from 50*l.* to 40*l.* per annum without information, to which she certainly was entitled, before such course was adopted by him." The letter then proceeded: "We have, therefore, to request at once particulars as to how and in what form of security the 1,000*l.* directed to be invested under testator's will is invested on her behalf, and for payment of 15*l.* 15*s.*, amount now due to her, and unless we receive cheque for that amount and the particulars asked for, we have instructions to institute proceedings against you without further delay." A few days later the defendant replied to the solicitors as follows:—

" March 14, 1894.

" *Re* the late Mr. Matthewman.

" Gentlemen,

" I am surprised at the contents of yours of 12th instant. With regard to reduced interest, your client had notice, and agreed,

and has been paid at the reduced rate without any objection being made. As to the funeral expenses, it was her own suggestion, and she has since agreed by letter. The investment is just where the testator left it.

“I am, yours, &c.,

“JOHN B. MATTHEWMAN,

“Sole surviving executor of the late W. M.”

The solicitors replied on the 15th that the letter of the 14th was “simply an evasive reply to theirs” of the 12th. On the 17th the defendant replied as follows:—

“From William Matthewman & Son,

“*Folly Hall Dye Works, Huddersfield.*

“Gentlemen,

“In reply to yours of the 15th instant, I have given you a full answer. The money is invested in above business, and has never been out. I have nothing to evade.

“Yours, &c.,

“JOHN B. MATTHEWMAN.”

On the 22nd the solicitors answered that the defendant's letter of the 17th was not satisfactory, and that they “were therefore instructed to request that the terms of the testator's will with regard to the 1,000*l.* in favour of Mrs. Neville be carried out, and that such investment be made to her satisfaction;” and proceedings were threatened in default of a satisfactory reply being received. On the 24th a writ was issued on behalf of Mrs. Neville and her surviving children (who were infants), claiming a declaration, *inter alia*, that the defendant had been guilty of a breach of trust in retaining or investing in the testator's business, of which he was a member, the sum of 1,000*l.*, and that the defendant was bound to make good such sum, together with all profits made by the employment thereof or interest at five per cent., and that the defendant might be ordered to pay the 1,000*l.* into Court.

On 5 July an application was made on behalf of the plaintiffs for payment by the defendant of the 1,000*l.* into Court. The appli-

cation was supported by an affidavit, to which the letters above referred to were made exhibits. The defendant filed an affidavit in opposition, in which he set out a statement of the testator's assets at the time of his death, showing them to have been insufficient, after deductions for debts and liabilities and funeral and testamentary expenses, for payment in full of the widow's annuity and the daughter's legacy.

On that application CHITTY, J., made an order for payment of the 1,000*l.* into Court.

The defendant appealed.

Swinfen Eady, Q.C., and A. Young, for the appellant.

Farwell, Q.C., and P. B. Abraham, for the respondents :

There is a clear admission by the letters that the defendant had the money in his hands.

Lord HERSCHELL, L.C. : This is an appeal against an order of Mr. Justice CHITTY, ordering the defendant to pay into Court a sum of 1,000*l.* bequeathed to him and one John Matthewman by the will of one William Matthewman, upon trust for the plaintiff for her life, and afterwards for her children. The question is whether that order can be supported.

[His Lordship then stated the facts, remarking that the defendant's letter of 14 March manifestly indicated that the 1,000*l.* had not been invested pursuant to the directions of the testator's will, but remained as he left it—*i.e.* in the business, and proceeded :]

Taking all the letters together, I think it is clear that the testator's money had been invested in the business, and, as regards any money belonging to the daughter under the will, that was invested in the business too.

It is said that there is here an admission by the defendant that he had in his hands the 1,000*l.*, and that there is sufficient to justify the order for payment of the amount into Court. I should not myself be satisfied that there was sufficient, even if the letters stood alone by themselves; but they do not stand alone, and what the Court must look at is the whole of the circumstances. There is an affidavit of the defendant which shows that the testator's assets, after

deducting the outgoings in respect of his debts and funeral and testamentary expenses, would not have been sufficient to pay the 52*l.* a year to the widow and 50*l.* a year to the daughter. During all the years from the testator's death up to recently, the defendant has himself paid the mother 52*l.* a year and the daughter 50*l.* a year. Looking at all the circumstances together, it would, in my opinion, be nothing less than monstrous to treat this as an unequivocal admission by the defendant that he had the 1,000*l.* in his hands. The only way in which he has laid himself open to any such suggestion is by having placed himself in a position of acting generously to his mother and sister by paying the one 52*l.* a year and the other 50*l.* a year. If he had not done that, but had stood upon his strict rights, there could not have been any such case as this made against him.

As regards the grounds upon which money may be ordered to be paid into Court, it is admitted that in old times this could not be done except upon an admission in the answer of the defendant that he had the money in his hands; then a step in the direction of relaxation of that rule was taken, and admissions upon affidavits came to be treated as sufficient; yet a further step was made, and an affidavit of the plaintiff charging that the defendant had the money in his hands, unanswered by the defendant, has been held to be sufficient, but beyond that I am not prepared to go. In *Freeman v. Cox* (1) the late Sir GEORGE JESSEL, when Master of the Rolls, said: "I will make a precedent. It seems to me that the principle on which the Court has ordered payment of money into Court has been that the defendant must admit that the money is in his hands for the purposes of the application. In *Jervis v. White* (2) Lord ELDON took the affidavit of the plaintiff charging the defendant with having a sum of money in his hands, and an affidavit of the defendant before answer, together, as an admission, and ordered the money to be paid into Court. Here we have the affidavit of the plaintiff and the service of the notice of motion upon the defendant. This, I think, is a sufficient admission, the principle being to make the defendant pay into Court what he does not dispute to be owing from him." That seems to me to lay down a clear, sound principle,

(2) 6 Ves. 738; 6 R. R. 26.

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and beyond that I, for my part, am not disposed to go. But if there is a question whether the money is owing or not, then the matter does not come within what I have read from the judgment of the late Master of the Rolls in *Freeman v. Cox* (1). It may turn out, after all, that the money is not owing, and never has been. If you had a clear unequivocal admission by the defendant, it could not be got rid of by his merely saying afterwards that he disputed the claim, but as soon as it is apparent that there is a question whether the money is owing the foundation for making any order for payment into Court is wanting. In this case there is nothing to show that the money is in peril.

Thus this case is one in which Mr. Justice CHITTY, in making the order appealed against, has gone further than the Court has gone in any previous case, and I think the appeal must be allowed.

LINDLEY, L.J.: I am of the same opinion. Unless care is exercised in these cases of ordering payment of money into Court, things will become very oppressive. The old practice was not liable to any such abuse, orders for payment being made only in cases of an admission in the defendant's answer; and the answer being drawn by a skilled person, there was no danger, when you had therein an admission that the defendant had the money in his hands, in making an order for payment of it into Court. When that practice was slackened and extended to include admissions in the defendant's affidavits, there was some danger of abuse, and when it was further slackened and extended to affidavits of the plaintiff not answered by the defendant there was still further danger.

I think in the present case the learned Judge in the Court below has gone wrong by pressing what is stated in the letters too far. I do not think they bear the construction that the defendant had the money in his hands. All that the letters come to is, in my opinion, this, that the money was never invested in the strict sense at all, but remained where the testator had left it. It is pressing them too far to say they mean that the 1,000*l.* had been invested by the defendant; the meaning is that the money was where the testator left it. I cannot extract from these letters any admission that the defendant ever had this money in his hands. It is very dangerous,

and in this case it would be very oppressive, to order payment into Court upon such a state of things as we have before us.

I agree that the appeal should be allowed.

DAVEY, L.J.: I agree in the view which has been expressed, that orders of this description made on interlocutory applications may become instruments of great oppression, and may work great injustice.

There is no doubt that, if there was any reason to think that the estate was insufficient to pay everything in full, it was the duty of the defendant to apportion it between the parties entitled, and his neglect to do so may expose him to liability in the future. But that is no reason why he should be ordered to pay 1,000*l.* into Court now. If he had taken the step of realizing the estate, the uncontradicted figures show that there would not have been enough to pay the widow and the daughter in full. What he has done is to pay 52*l.* a year to the widow regularly and 50*l.* a year to the daughter, hoping that if business turned out well he would be able to answer the daughter's legacy in full. It may be that, under these circumstances, he has admitted assets sufficient to pay the daughter's legacy in full. He may be right or he may be wrong in saying the assets did not amount to more than what he says, but this is a question for the trial.

In the circumstances of this case it would, in my opinion, be a perversion of justice to order the defendant to pay the 1,000*l.* into Court. The Lord Chancellor and Lord Justice LINDLEY have stated the course which the practice relative to orders for payment into Court has taken. The first class is where the defendant had admitted in his answer that the money was in his hands. Secondly, that class was extended to include admissions in affidavits; and thirdly, a further extension was made by the late Sir GEORGE JESSEL, as shown in the judgment which the Lord Chancellor has in part read (1). I am not inclined to make any further extension. Before money is ordered to be paid into Court before trial there ought to be a case where, and it ought only to be when, the defendant has the money in his hands, and it is clear that he has no defence to the demand.

In the present case I think the defendant ought not to be ordered

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to pay the 1,000*l.* into Court; and now that there are speedy and rapid means of trying questions of liability, and that at small expense, there is less reason than there was formerly to order these payments before trial.

I agree that the appeal must be allowed.

Appeal allowed.

Solicitors: *Ramsden, Radcliffe & Co.*, for *Ramsden, Sykes & Ramsden*, Huddersfield, for the Appellant.

Pitman & Sons, for *Ferns & Sons*, Leeds, for the Respondents.

IN RE LORD GERARD AND BEECHAM'S CONTRACT.

1894, July 11. LORD HERSCHELL, L.C., AND LINDLEY AND
DAVEY, L.JJ.

Vendor and Purchaser—Lands sold reserving Rent—Power of limited Owner to Sell—Easement—Rentcharge—Special Act—Lands Clauses Act, 1845 (8 & 9 Vict. c. 18), ss. 10, 11.

Wherever land is sold reserving a rent, that rent may, since the statute 4 Geo. 2, c. 28, properly be called a rentcharge, for there is incident to it a right of distress.

An enactment in a special Act, incorporating the Lands Clauses Act, 1845, that "it shall be lawful for the mayor, &c., to purchase either absolutely for a sum in gross or at an annual or other rent," any lands therein referred to, "or any easement in or over the same," and that "the persons empowered by the Lands Clauses Act, 1845, to convey lands shall have full power to convey or grant in perpetuity at an annual or other rent any lands for the purposes of this Act or the Acts incorporated herewith, or any easement," has the effect of extending section 10 of the Lands Clauses Act so as to give to a limited owner the same power of selling lands for a rentcharge in lieu of a sum in gross as an absolute owner has under that section, and also of enabling him to sell an easement for a rentcharge which will be charged by virtue of section 11 on the rates and tolls payable under the special Act.

APPEAL from Chitty, J.

Particulars of sale by auction described the property to be offered for sale as an "aggregate yearly rentcharge or sum of 215*l.* 9*s.*, payable half-yearly on 1 January and 1 July in perpetuity by the corporation of the city of Liverpool in respect of a waterpipe rent, and created by virtue and under the authority of the Liverpool Corporation Waterworks Act, 1855, and subsequent Acts, and secured by covenants of the corporation of the borough of Liverpool and by a statutory charge on the rates leviable by the corporation under the provisions of some of those Acts."

The conditions of sale stated, *inter alia*, as follows: "(iii.) The property offered for sale is composed of the whole of a perpetual yearly rent of 1*l.* 5*s.* created by a deed dated 31 March, 1856, and of part (214*l.* 4*s.*) of a perpetual yearly rent of 250*l.* created by a deed dated 5 April, 1856, and the titles shall commence with those deeds respectively, and the rents thereby created shall be deemed to have been thereby well and effectually created . . . The

vendor sells the property under his statutory power as tenant for life of the Garswood estate in Lancashire, including the said yearly rent settled by his father and himself by a deed dated 24 March, 1875, which deed and every deed of earlier date shall be accepted by the purchaser as conclusive evidence of everything recited, stated or implied therein."

At the sale Thomas Beecham was the highest bidder for and was declared the purchaser of the property, and he paid a deposit and signed a contract endorsed on the particulars and conditions of sale for completion of the purchase in accordance with the conditions.

The deeds of 31 March, 1856, and 5 April, 1856, so far as is material to this report, were, *mutatis mutandis*, similar in form, except that the vendor and grantor in the deed of 31 March, 1856, was the absolute owner of the land over which easements were thereby granted, whereas the vendor and grantor in the deed of 5 April, 1856, was only tenant for life in possession of the land granted by that indenture.

By the deed of 31 March, 1856, which was made between James Clough of the one part and the Liverpool Corporation of the other part, J. Clough granted easements over land in the township of Ashton to the corporation, their successors and assigns, yielding and paying therefor yearly and every year unto the said J. Clough, his heirs and assigns, the yearly rent or sum of 1*l.* 5*s.*, and the corporation covenanted to pay such rent.

By the deed of 5 April, 1856, which was made between Sir Robert Tolver Gerard (Lord Gerard's father) of the one part and the Liverpool Corporation of the other part, and which recited the Liverpool Corporation Waterworks Act, 1847, and sections 2 and 3 of the Liverpool Corporation Waterworks Act, 1855 (1), and that Sir R. T. Gerard was tenant for life in possession of the lands thereafter

(1) Section 2 of the Liverpool Corporation Waterworks Act, 1855 (18 Vict. ch. lxvi.), enacted as follows:—

"Be it enacted that, subject to the provisions of this Act and with and subject to such of the powers and provisions of the recited Acts, and of the Acts incorporated therewith as re not hereby altered or repealed, it

shall be lawful for the mayor, aldermen and burgesses to make and maintain the said works in the line or situation, on the levels and upon the lands delineated on the said plans and described in the said book of reference, and for that purpose to purchase, either absolutely for a sum in gross or at an annual or other rent, and to

mentioned, with remainder to the use of his eldest son (Lord Gerard) in tail male, it was witnessed that in consideration of the yearly rent thereafter covenanted to be paid, and of the covenants and agreements on the part of the corporation thereafter contained, Sir R. T. Gerard, under and by virtue and in pursuance and execution of the powers, authorities, and provisions created by and expressly and by reference contained in the said Liverpool Corporation Waterworks Act, 1855, granted unto the Liverpool Corporation, their successors and assigns, certain parcels of land and certain easements over those and other lands respectively situate in the said township of Ashton, to hold the same unto the said Liverpool Corporation, their successors and assigns, paying therefor yearly for ever unto the said Sir R. T. Gerard during his life, and after his decease to the persons or person who under the limitations contained in the will of Sir William Gerard, deceased, were or was or might become entitled to the lands and hereditaments, subject to the uses of such will, in remainder after the life estate of the said Sir R. T. Gerard and to the heirs male of the body or heirs or assigns as the case might be of such person or persons, the yearly rent or sum of 250*l.* by equal half-yearly payments on 1 January and 1 July in every year. And the deed contained a covenant, *inter alia*, by the corporation to pay such yearly rent as aforesaid.

In the requisitions on title and the correspondence which took place, the purchaser objected to the vendor's title on the ground that the rent sold was not (as described in the particulars of sale) a charge upon the rates leviable under the special Acts, and was not a rentcharge at all, but was a mere perpetual rent payable by the corporation without any security whatever, section 11 of the Lands

enter upon, take, and use such of the lands delineated on the said plans and referred to in the said book of reference as shall be necessary for that purpose, or any easement, privilege, power or authority in or over the same; and the new works respectively by this Act authorized shall for all intents and purposes become and be part of the undertaking of the Liverpool Corporation Waterworks."

Section 3 provides as follows:—

"The persons empowered by the Lands Clauses Consolidation Act, 1845, to convey lands shall have full power to convey or grant in perpetuity, at an annual or other rent, any lands for the purposes of this Act or the Acts incorporated herewith, or any easement, power or authority in or over such lands."

Clauses Act, 1845, being, as he alleged, applicable only to conveyances by absolute owners and not to limited owners, such as the vendor under the deed of 5 April, 1856.

The vendor took out a summons under section 9 of the Vendor and Purchaser Act, 1874, for the purpose of obtaining the decision of the Court upon the questions raised by the purchaser's objection.

On 25 April, 1894, CHITTY, J., being of opinion that the rents created by the deeds of 31 March, 1856, and 5 April, 1856, were a statutory charge on all the water rates leviable by the Liverpool Corporation under their special Acts down to and including the Liverpool Corporation Waterworks Act, 1855, declared that a good title had been shown to the property comprised in the contract.

The purchaser appealed.

Byrne, Q.C., and *Theobald*, for the appellant :

This is not a rentcharge at all, but a mere unsecured rent. A rent cannot issue out of an easement.

Levett, Q.C., and *T. C. Wright*, for the respondent :

This is a rentcharge within section 10 of the Lands Clauses Act (2) : *Dodds v. Thompson* (3).

The Act applies to the case of an easement : see per Lord Watson in *Great Western Railway v. Swindon and Cheltenham Extension Railway* (4).

Theobald replied.

(2) Section 10 of the Lands Clauses Act, 1845, is as follows :—

“It shall be lawful for any person seised in fee of, or entitled to dispose of absolutely for his own benefit, any lands authorized to be purchased for the purposes of the special Act, to sell and convey such lands or any part

thereof unto the promoters of the undertaking in consideration of an annual rentcharge payable by the promoters of the undertaking, but except as aforesaid the consideration to be paid for the purchase of any such lands or for any damage done thereto shall be in a gross sum.”

(3) L. R. 1 C. P. 133 ; 35 L. J. C. P. 97 ; 14 W. R. 476.

(4) 9 App. Cas. 787, 801 ; 53 L. J. Ch. 1075, 1083 ; 51 L. T. 798, 802 ; 32 W. R. 957, 960.

Lord HERSHELL, L.C.: In this case objection is taken to the title of a rentcharge contracted to be purchased by the appellant from the respondent on the ground that a good title cannot be made to the rentcharge, and therefore the subject-matter of the property offered to be sold is not that to which the purchaser is entitled.

The rentcharge in question was described in the particulars of sale as an aggregate yearly rent or sum of 215*l.* 9*s.* payable in perpetuity by the corporation of the city of Liverpool (in respect of a waterpipe rent), and created by virtue of and under the authority of the Liverpool Corporation Waterworks Act, 1855, and subsequent Acts, and secured by covenants of the corporation of the borough of Liverpool, and by a statutory charge on the rates leviable by the corporation under the provisions of some of those Acts. The rent, except as to 1*l.* 5*s.*, was created by a deed of 5 April, 1856. I will deal with the part of it other than the 1*l.* 5*s.* first. By that deed certain land was conveyed to the Corporation of Liverpool for the purposes of waterworks, and there was reserved a yearly rent of 250*l.* There was a covenant of the corporation to pay that rent. The conveyance was by a limited owner, therefore section 10 of the Lands Clauses Act, 1845 (2), which is incorporated with the Liverpool Corporation Waterworks Act, did not apply in terms to such a case; but, in order to consider what was the effect of that reservation of rent and what rights it gave, and how far this rent is charged on the rates, it is necessary to examine the provisions of the Lands Clauses Act, though, as I have said, it only refers to the case of an absolute owner.

Section 10 runs thus: [His Lordship referred to the section in question (2), and proceeded:] Now much stress has been laid by the appellant on the use of the word "rentcharge" in section 10. I do not think there was any such stress intended to be laid by the Legislature upon the word. I think that the contrast was between a sale of the land reserving rent as its price and a sale of the land for a sum in gross. That being the provision of section 10, section 11 then provides as follows: [His Lordship referred to the section (5), and proceeded:] I understand the words "such conveyance" in that section to refer to the sale of land in

(5) Section 11 of the Lands Clauses Act, 1845, provides that:—

"The yearly rents reserved by any such conveyance shall be charged on

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consideration of an annual rentcharge, and not for a sum in gross. Now, it appears to me that, wherever a rent is reserved on a sale of land as distinguished from a sum in gross, that rent becomes *ipso facto* charged on the rates and tolls under that section 11. Wherever land is sold reserving rent, that rent may, since the statute of 4 Geo. II. c. 28, properly be called a rentcharge, for there is incident to it the right to distrain. Consequently section 11 would be applicable to such a case.

So far I have dealt with the case of an absolute owner, and but for the special Act under which this land was sold, it seems to me clear that there was no power in a limited owner to sell in consideration of a rent, but by sections 2 and 3 of the Liverpool Corporation Waterworks Act, 1855 (1), it is expressly provided that "subject to the provisions of this Act, and with and subject to such of the powers and provisions of the recited Acts and of the Acts incorporated therewith as are not hereby altered or repealed, it shall be lawful for the mayor, aldermen and burgesses to purchase, either absolutely for a sum in gross or at an annual or other rent," any of the lands mentioned in the book of reference "or any easement" in or over the same.

Then section 3 provides that "the persons empowered by the Lands Clauses Consolidation Act, 1845, to convey lands shall have full power to convey or grant in perpetuity at an annual or other rent any lands for the purposes of this Act or the Acts incorporated herewith, or any easement." In construing these sections it is necessary to bear in mind what were the powers existing at the time this Act was passed. Then an absolute owner could convey in consideration of a rentcharge or a sum in gross, therefore it is not to be supposed that the object of the Act was to give a power which already existed. It seems to me clear that the object of this amend-

the tolls or rates, if any, payable under the special Act, and shall be otherwise secured in such manner as shall be agreed between the parties, and shall be paid by the promoters of the undertaking as such rents become payable; and if at any time such rents be not paid within thirty days after they so become payable, and after demand

thereof in writing, the person to whom any such rent shall be payable may either recover the same from the promoters of the undertaking, with costs of suit, by action of debt, in any of the superior Courts, or it shall be lawful for him to levy the same by distress of the goods and chattels of the promoters of the undertaking."

ing Act was twofold : to give to a limited owner the same power of selling for a rentcharge, in lieu of a sum in gross, as an absolute owner already had, and also to enable an easement to be purchased instead of purchasing the land for a sum in gross or for a rentcharge. The effect was to put a limited owner in the same position as an absolute owner was in under section 10 of the Lands Clauses Act ; therefore, where there is a sale by a limited owner for a rent reserved, section 11 applies and charges it on the rates and tolls. In fact, it is hardly conceivable that anything else could be intended, and therefore it is clear that, as regards the whole rentcharge, it is properly described as charged on the rates and tolls leviable under the Waterworks Act.

But part of the subject-matter was a rent of 1*l.* 5*s.* in respect of the sale of easement, which, of course, could only have been effected under the provisions of the Act of 1855. It is said that, though rent may issue out of land, it cannot properly issue out of an easement ; but when the Legislature, having in view sections 10 and 11 of the Lands Clauses Act, said you might sell an easement reserving a rent instead of in consideration of a sum in gross, could it be intended otherwise than that section 11 should be applicable to such a rent, even though, strictly speaking, it might not perhaps be termed a rentcharge ? I cannot think, looking at sections 2 and 3 of the Act of 1855 (1), that anything else was the intention of the Legislature. If that be so, it disposes of the appellant's contention, subject only to a point which was made but scarcely pressed (and I do not wonder that it was not pressed), that the terms of sale indicated to the purchaser that this was a charge not merely upon the rates and tolls leviable under the Waterworks Acts, but on the rates leviable by the corporation generally. I am certainly unable to read the language in that sense. There seems to me to be nothing to indicate that the rates charged are other than those leviable under the Waterworks Acts.

In my opinion, the judgment of the Court below was right, and the appeal must be dismissed.

LINDLEY, L.J. : I am of the same opinion, and have only a few words to add. This appeal is, in my opinion, based on a misconception of the meaning of " rentcharge " in section 10 of the Lands Clauses Act. When you consider the Act of 4 Geo. II. c. 28,

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which gave a power of distress for all rents, there is no magic in the word "rentcharge"; if there is a rent, and not a mere sum covenanted to be paid, it is utterly immaterial whether you speak of rent or rentcharge, because under the Act of Geo. II. you have the right to distrain for it, and any rent for which you have the right to distrain certainly appears to me to be a rentcharge within the meaning of the Lands Clauses Act. I think it has been attempted to put upon the word "rentcharge" a burden which it will not bear. That is the real clue to the mistake made in the appellant's argument. I will say no more; the rest of the case is easy. I agree with the construction which the Lord Chancellor has put upon the Act.

DAVEY, L.J.: I am also of the same opinion, and I only wish to say this: too much stress has been put on the words "annual rentcharge" in section 10 of the Lands Clauses Act (2). It was accurate to use the word "rentcharge" in the case of a sale by an absolute owner, which is what that section referred to. Either it was a rentcharge because there was a right to distrain, or, even if it were in law a rent seck, it would have the quality of the right to distrain attached to it, and would therefore be within the definition of rentcharge. But even if that were not so, it is observable that section 11 (5) does not use the word "rentcharge;" it says "the yearly rent reserved by any such conveyance;" and I think that, even if it was not a rentcharge properly so called in section 11, it would be strictly accurate to call it a rentcharge in section 10, and to read section 11 as defining that upon which it was to be charged, and the rights which were given for making that charge effectual.

I agree that section 8 of the Liverpool Corporation Waterworks Act, 1855, must be construed as extending section 10, so as to give to a limited owner the right to sell in consideration of a rent, and it is to be observed that it is to be "an annual or other rent." Now, says the appellant, you cannot reserve a rent out of an easement. Well, a subject cannot at common law, but the king could at common law, and the subject may by statute, and, although there may be no power of distress attached to it, it is a rent; that is to say, it is a rent issuing out of the subject-matter of the conveyance—a

rent reserved out of the grant of the conveyance. The effect of the Act of 1855 is to make that part of the code which applies to lands conveyed in consideration of rent applicable to a sale by a tenant for life or other limited owner in consideration of an annual or other rent of any land or any easement to the Liverpool Corporation.

In my judgment the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Maples, Teesdale & Co.*, for *Oppenheim & Malkin*, St. Helen's, for the Appellant.
Meynell & Pemberton, for the Respondent.

IN RE McHENRY, McDERMOTT v. BOYD, EX PARTE BARKER.

1894, July 9. LORD HERSCHELL, L.C., & LINDLEY & DAVEY, L.JJ.

Statute of Limitations—Mortgage of Bonds—Special Authority to Sell—Undertaking to pay any Deficiency on Realization—Sale—New Obligation—Cause of Action—21 Jac. 1, c. 16, s. 3.

Where on a loan bonds are mortgaged by way of collateral security for repayment on a fixed day, and the mortgagee is authorized in the event of the loan remaining unpaid after it becomes due to realize the securities, an undertaking in the same instrument by the mortgagor to pay any difference between the net proceeds of the securities and the amount due does not create a new and independent obligation so as to postpone the operation of the Statute of Limitations until such realization, but the statute begins to run as from the date fixed for repayment of the loan.

APPEAL from North, J.

In August, 1882, Barker advanced to J. McHenry a sum of 13,365*l.* which was invested by the latter in the purchase of Western Extension 8 per cent. bonds of the nominal value of 13,500*l.* On the occasion of the loan McHenry addressed to Barker the following document, dated 25 August, 1882: "In consideration of your advancing to me the sum of 13,365*l.* at the rate of 6½ per cent. per annum, repayable with interest on 30 November, 1882, I hand you herewith the undermentioned securities of the nominal value of 13,500*l.*, to be held by you as collateral security for the due

repayment of the said loan and the interest thereon. In the event of the loan remaining unpaid after it becomes due, I hereby authorize you to realize the securities as you may deem fit for the purpose of repaying yourself the amount due to you, and I undertake to pay you any difference between the net proceeds of the securities and the amount due to you as well on account of the sum advanced as for interest thereon, and all charges and expenses of realization."

By a memorandum endorsed on the document the loan was renewed for a further period of three months. The securities above referred to were the Western Extension bonds which were held by Barker, and the dividends on which were received by him until November, 1889, when he sold the bonds. The proceeds of the sale were not sufficient to repay the whole of the loan, and with the exception of 100% paid on account of the loan in February, 1884, McHenry made no payments on account, nor did he give any acknowledgment. On 26 May, 1891, McHenry died. This action, which was a creditors' action, was then brought, and on 4 August, 1891, an order for the administration of the estate of the testator McHenry was made. Barker carried in a claim in respect of the balance remaining unpaid on his loan, but the chief clerk disallowed the claim on the ground that it was barred by the Statute of Limitations (21 Jac. 1, c. 16), inasmuch as more than six years had elapsed since February, 1883, when the loan as renewed was repayable. Barker took out a summons to vary the chief clerk's certificate by admitting his claim to proof. NORTH, J., on 3 May, 1894, held that the undertaking in the document of 25 August, 1882, to pay the difference between the net proceeds of the securities on realization and the amount due to Barker created a new and independent obligation which did not arise until realization actually took place, that the obligation was not the ordinary one implied by law on a simple mortgage of securities, but arose when the realization took place, and that, therefore, Barker's claim was not barred by the statute, but must be admitted to proof. McHenry's executors appealed.

Cozens-Hardy, Q.C., and *Gregson*, for the appellants:

The Statute of Limitations is a complete answer to the claim.

Barker could have sued for repayment of the loan in February, 1883, and from that time the statute began to run: *Reeves v. Butcher* (1).

S. Hall, Q.C., and H. Brown, for the respondent Barker :

The right of action did not arise until after the sale of the securities. It is quite possible that a person may contract so as to postpone the cause of action indefinitely. There were two contracts in this transaction which gave rise to two separate causes of action. First, there is a contract on the loan to repay the same, and in addition there is the authority to sell the securities, and the promise to pay the difference, which is a separate and distinct promise from the original promise to repay the debt. The realization of the securities is the condition precedent to the right of action under the second contract: *Hammond v. Smith* (2). The fallacy of the argument on the other side is that the existence of the right to sell is assumed, whereas there is no power to sell except under the memorandum of agreement. The difference between an ordinary mortgage and the mortgage in this case is, that in the former the mortgagee can pursue all his remedies concurrently, but here the agreement is that the mortgagor was to pay an uncertain sum at some future time, namely, when the securities were realized, and therefore the mortgagee could only sue when the difference was thus ascertained. Although the debt could be sued for, the two parts of the contract are separate. The case is analogous to that of a surety as to whom it has been held that the Statute of Limitations does not begin to run until the amount payable by him has been ascertained: *Ex parte Snowden, In re Snowden* (3).

Cozens-Hardy, Q.C., was not called upon to reply.

LORD HERSCHELL, L.C. : The sole question arising on this appeal is whether a certain claim against the executors of Mr. McHenry is barred by the Statute of Limitations. On 20 August, 1882, the sum of 13,365*l.* was advanced by Mr. Barker to Mr. McHenry, and

(1) [1891] 2 Q. B. 509; 60 L. J. Q. B. 619; 65 L. T. 329; 39 W. R. 626.

(2) 33 Beav. 452; 9 L. T. 746; 12 W. R. 328.

(3) 17 Ch. D. 44; 50 L. J. Ch. 540; 44 L. T. 830; 29 W. R. 654.

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a document was thereupon signed by Mr. McHenry in these terms : [His Lordship read the document, and continued :] A memorandum was endorsed upon that document which extended the loan for three months. That would bring it to February, 1883. It is stated that in 1884 there was a sum of 100*l.* paid on account, but it is obvious that, as regards the debt due in February, 1883, it was, notwithstanding any payment on account, completely barred at the time of the death of the testator in May, 1891. But it is said that the claim is not barred by reason of the second paragraph of the document, which I have read, inasmuch as the securities were not sold until the year 1889, and it is said that until their realization the difference between the net proceeds of the securities and the amount due was not, and could not be ascertained, and that therefore the statute could only run from that date. This view found favour with the Judge in the Court below, but with all deference I am unable to agree with him. The second paragraph of the document was intended to give, and no doubt did give, a power of sale, and the power of sale being so given, the creditor, if he exercised his power of sale, would be bound to set against the debt *pro tanto* the amount realized by the securities, but in determining what amount was realized the expenses of realization must be taken into account. It is only the net sum realized, after allowing the expenses of realization, that can be treated as the proceeds of the securities to be set against the creditor on the balance of the creditor's claim. Now that claim could have been made by him quite independently of any express authority conferred by the latter part of this agreement. No doubt it was properly admitted by the respondent that, if the second part of the agreement had been confined to conferring the power of sale, the right of the creditor by virtue of the loan would be precisely what it is if these words had not been so inserted. It seems to me impossible to say that conferred a new, separate and independent cause of action, so that the statute runs from that date. The truth is, the debt was one debt only, and the provision I have referred to did not create a new debt, but only prescribed what was to be done and the use to be made of the money realized. The contention of the respondent goes to this length: that, under circumstances such as these,

although, as I have said, the words used give no right beyond that which the law itself would confer, that because these words are used the operation of the statute is indefinitely postponed, whereas if the words had not been inserted the statute would have run from an earlier date. It appears to me that that is a most impossible contention. For these reasons I think the judgment must be reversed.

LINDLEY, L.J. : I am of the same opinion ; but, as we are differing from the learned Judge, I shall state shortly the grounds for the view I take of the matter. In the first place, the question turns on the words of the statute of James (21 Jac. 1, c. 16), which is that an action of this kind must be brought within six years of the cause of such action and not after. Now this document has been read. The transaction evidently amounts to a loan. The first part of it refers to a loan of 13,500*l.*, repayable on 30 November, 1882, which is enlarged by the memorandum of deposit until February, 1883. Now, that part of the document does not in words contain a promise to pay the debt at that time. I put it to the counsel for the respondent whether they pushed their argument so as to say that an action could not then have been brought upon the contract of loan. It obviously could have been brought. Now, there comes the clause which Mr. Justice NORTH relied upon as constituting a new promise. That clause appears to me to affect a different matter, and not to create an obligation to pay, but to give, in fact, a right to the creditor to deal with the securities, and it really amounts to nothing more or less than this. It is a direction to the creditor to realize the securities with a direction to him as to what he is to do with the proceeds. It does not affect the cause of action. [His Lordship read the second paragraph, and continued :] The promise is this. In the event of the loan remaining unpaid after it becomes due, I authorize you to realize the securities ; but I undertake to repay you any difference between the net proceeds and the amount of the loan. If the amount is not paid when it is payable, you may realize the securities, but you must give credit for the amount of the realization after deducting the costs and expenses of such realization. It does not affect the original obligation to pay

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the debt. As to the Statute of Limitations, I think the cause of action accrued long before the action was commenced.

The appeal must be allowed with costs.

DAVEY, L.J.: I am of the same opinion, and have nothing to add. The summons to vary the chief clerk's certificate must be dismissed with costs.

Appeal allowed.

Solicitors: *Hores & Pattisson*, for the Appellants.

G. S. & H. Brandon, for the Respondent.

IN RE MCHENRY, McDERMOTT v. BOYD, EX PARTE
LEVITA.

1894, July 27. LORD HERSCHELL, L.C., & LINDLEY & DAVEY, L.JJ.

Bankruptcy—Annulment—Duty of Disclosure—Material and Immaterial Facts—Secret Agreement.

A person who applies to the Court for an order must not mislead the Court, and must disclose to it all facts which are material for the purpose in hand; but he need not disclose immaterial facts.

On a petition for annulment of a bankruptcy, the only question the Court has to consider is (ordinarily) whether all the creditors have in fact consented; and therefore the fact that the bankrupt has agreed that in consideration of one of his creditors assigning his debt to trustees for the bankrupt at a certain price the bankrupt will pay a further sum to that creditor, is not a material fact, and such collateral agreement is not tainted with fraud merely because it was not disclosed to the Court or to the other creditors.

Seemle, no concealment can in such a case be a ground for avoiding the transaction unless it appears that the creditor was a party to an agreement to conceal.

APPEAL from North, J.

The testator, James McHenry, was adjudicated bankrupt on 25 March, 1886. One Gustave Levita proved in the bankruptcy a debt which was admitted at 25,000*l*. In 1889, G. Levita assigned that debt to his brother Emile Levita. By a deed dated 20 December, 1889, E. Levita purported to assign the debt to trustees for the testator in consideration of the sum of 2,000*l*. paid to him by them. There was evidence that the testator had previously agreed verbally that in consideration of such assignment

he would pay to Levita a further sum of 6,000*l.* Such verbal agreement was not referred to in the deed. Subsequently Levita received from the testator a letter dated 17 January, 1890, by which the testator "undertook" to pay to Levita the sum of 6,000*l.*

The assignment to trustees had been made with a view to the annulment of the bankruptcy, and on 31 January, 1890, the testator accordingly presented a petition for annulment, the trustees assenting in writing in respect of all the debts vested in them. On 25 February, 1890, an order was made which, after reciting that all the creditors had been paid or settled with or had assented, annulled the bankruptcy.

The testator died in 1891, and in an action for the administration of his estate, which was insolvent, the chief clerk allowed a claim by Levita for the 6,000*l.* On 4 May, 1894, on a summons taken out by the defendant Edward Robert McDermott, one of the testator's executors, NORTH, J., varied the chief clerk's certificate and disallowed the claim, holding that the promise to pay the 6,000*l.* had been concealed from the Court and the other creditors in such a way as to taint the transaction with fraud. Levita appealed.

Finlay, Q.C., and Clauson, for the appellant :

NORTH, J. relied on cases which do not support his decision. *Murray v. Reeves* (1) only shows that an agreement to withdraw opposition to the debtor's discharge, which ought to be honestly conducted, is void.

[Lord HERSCHELL, L.C., referred to *Jackman v. Mitchell* (2).]

The other cases go no further: *Hall v. Dyson* (3), *Nerot v. Wallace* (4). *Ex parte Joseph Green* (5) shows that a bankrupt is entitled to a supersedeas on obtaining the consent of his creditors. The forms of certificate and petition in Montagu and Ayrton's *Law and Practice of Bankruptcy* (2nd edit., vol. ii., pp. 138-139) assume

(1) 8 B. & C. 421, 425; 2 Man. & R. 423.

(2) 13 Ves. 581; 9 R. R. 229.

(3) 17 Q. B. 785; 21 L. J. Q. B. 224.

(4) 3 T. R. 17.

(5) 1 Mon. D. & De G. 174.

that their consent is sufficient. In *Ex parte Jones* (6) Lord CAIRNS only says that it is not absolutely a matter of course to annul when the creditors who have proved consent.

[LINDLEY, L.J., referred to *Ex parte Duckworth* (7).]

The strongest authority in our favour is *Smith v. Salzmann* (8).

[Lord HERSCHELL, L.C. : That seems very like this case.]

There is no evidence to support NORTH, J.'s decision.

Cozens-Hardy, Q.C., Reed, Q.C., and Broxholm, for the respondent, the defendant E. R. McDermott :

A fraud on public policy or the policy of the bankruptcy laws is enough to taint the transaction.

[Lord HERSCHELL, L.C. : Can it be that it is a fraud to conceal that which would have made no difference if disclosed ?]

The effect of the transaction is to increase the debts of the insolvent by 6,000*l.*

[They cited *Kearley v. Thomson* (9).]

Finlay, Q.C., was not called upon to reply.

Lord HERSCHELL, L.C. : This is an appeal from a judgment of Mr. Justice NORTH, by which the appellant was found not entitled to prove against the estate of Mr. McHenry. [The Lord Chancellor stated the facts, and continued :] The question now arises, can a claim be made against McHenry's estate for this sum of 6,000*l.* ? It is a debt, beyond controversy, unless it can be shown that the agreement between McHenry and Levita, although made in point of fact, was void in point of law. Of course it would only be void if it was immoral, or against the law as being against public policy. The case was presented in this way. It was said that this promise

(6) L. R. 3 Ch. 144 ; 16 W. R. 322.

(7) 16 Ves. 416.

(8) 9 Ex. 535 ; 23 L. J. Ex. 177.

(9) 24 Q. B. D. 742 ; 59 L. J. Q. B. 288 ; 63 L. T. 150 ; 38 W. R. 614.

to pay 6,000*l.* was kept back from the knowledge of the other creditors, and concealed from the Court, and that consequently it was an agreement which could not be sustained. Now that depends entirely upon what duty there was to the Court on the presentation of a petition of this description, which depends again upon the functions possessed by the Court, and what evidence the Court ought to require in order to determine whether the bankruptcy shall be annulled. It appears to me that all the Court had to consider was whether, in point of fact, all those persons who were creditors had consented to the annulment which Mr. McHenry desired. If they had, it seems to me that all was established which it was necessary for the Court to be satisfied of before annulling the bankruptcy. It is laid down in the case of *Ex parte Duckworth* (7) that the requisite to an annulment of bankruptcy is the consent of all the creditors. I am not suggesting that in such a case the Court might not hold its hand, because there is a dictum of Lord CAIRNS in *Ex parte Jones* (6), where he said he was not prepared to say it might not be right to withhold consent in the interest of the absent creditors. It is not necessary to express an opinion whether that was well founded or not. All we have to consider is whether there was in this case any necessity for bringing before the Court more than the fact of the consent of the original creditors or their assignees. I think there was not; but then it is said that, though it may not have been necessary to inform the Court of the considerations which led the creditors or their assignees to assent, yet if you purport to communicate that you must communicate it truly. First of all, I do not see that there was any untruth in the representations made to the Court. It was true to say, as was said, that it was in consideration of 2,000*l.* paid to Mr. Levita that the assignment had been made. It was not the less true because there was a collateral agreement which involved a promise by the debtor to pay a further sum. It seems to me it was no more necessary to communicate that than any other promise made by the debtor to his creditors. I do not see that this was in fact concealed, but it seems to me to be far from clear that not to communicate immaterial facts can ever be a ground for avoiding a transaction. All that is material no doubt you are bound to disclose. You are bound not to mislead the Court, but in this

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case I cannot see that it can be said that in any way the Court was misled.

Then, how about the other creditors? I quite agree that if it were a case in which all the creditors were dealing on a common basis, or understanding that they were acting on a common basis, any person who was bargaining behind the backs of the rest for a private advantage could not maintain the transaction for a moment. Or I go further, and say that if the bargain made by one creditor and the debtor were to provide for a secret payment to that creditor, in order that the other creditors might be induced to take the course of agreeing to an annulment upon the supposition that such creditor was receiving less than he was in fact receiving, that would be a fraud, and the transaction could not be supported. But in the present case nothing of the kind appears, and I am satisfied there is no foundation for any suggestion of that kind. There was not a pretence for saying that the creditors were being treated on the same basis by any proportioned payments. With regard to the alleged concealment, where is the evidence that Levita was a party to any such concealment? He had nothing to do with the petition for annulment. I cannot see a trace of his having given any directions that the collateral agreement to pay him 6,000*l.* should not appear in any statement. It was made known to the trustees, and I cannot see a trace of any agreement that it should be kept back from anybody. That seems to me conclusive of one part of the case put forward for the respondent, because the contract could only be void because of the concealed agreement, if the agreement was concealed by arrangement between the debtor and the creditor, that is, if it was an arrangement intended to be concealed. If Mr. McHenry himself chose to conceal it, that could not enable him afterwards to treat the transaction as void.

I think the learned Judge has, apparently by an oversight, regarded this as a case in which the debtor became discharged from his debts. That, of course, is a mistake. He did not become discharged. Every right of the creditor in the annulment came into existence in the same force as it had before the bankruptcy.

As regards the cases, none of them are authorities for the proposition contended for. In *Jackman v. Mitchell* (2) a bond was held

bad which was given to secure to the defendant, the largest creditor, a payment beyond the composition, for the purpose of inducing the defendant to agree to the annulment, and thereby to get the other creditors to follow his example, so that the father of the obligor might be extricated from his difficulties. That was a clear case of fraud on the other creditors, who would be induced to think that the chief creditor was consenting on certain terms which did not represent the truth. The next case was *Hall v. Dyson* (3). That was a case in which there was an agreement made by a creditor with the attorney of the insolvent that, for a certain sum of money, he would not oppose the insolvent's discharge. Lord CAMPBELL said that was a fraud on the insolvent laws. [The Lord Chancellor read part of the judgment, and continued:] Therefore it was against public policy. What bearing that has upon such a case as the present I do not see, because I do not see any moral obligation upon Levita to disclose this agreement. The third case relied on was *Murray v. Reeves* (1), a case of the same description. Then there was *Nerot v. Wallace* (4), where a promise was made that, in consideration that the assignees and commissioners would forbear to examine a bankrupt as to certain sums he was alleged to have received and not accounted for, the promisor, a friend of the bankrupt, would make good those sums. That was held void, as tending to hush up malpractices. None of these cases really seem to me to bear at all upon the present.

I think this appeal must be allowed, with costs here and below.

LINDLEY, L.J. : I am of the same opinion. It appears to me the key to this case is to be found in the fact that when creditors consent to an annulment each creditor consents upon such terms as he may think proper. They do not work in unison ; it is not like a composition deed. The bankrupt makes the best arrangement he can with each of the creditors. It is not usual to inquire into the terms upon which their consent is given, and no creditor who consents, does in fact represent to the others that he does so upon any particular terms, and no creditor can say with truth, " I consented on the supposition that you were consenting on the same terms." When once you get that clearly before you it is difficult to

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see what objection there is to this alleged concealment. Levita was a creditor for 25,000*l.* The bankrupt wanted him to assign his debt to persons named, and Levita said, "Very well, I will if you promise to pay me 6,000*l.* by-and-by for making that assignment." Subsequently the assignment was made. After that Levita had no more to do with the debt of 25,000*l.* than I have, but the persons who have to consent to the annulment are the purchasers of that debt. They say that the debt has been assigned to them, and so it has. It appears to me that the learned Judge has gone wrong by considering that the bankrupt was freed from his original debts by the annulment, and that there has been some unfair advantage got as regards his assets by some of the creditors over the others.

When you come to look at the authorities, they are clearly distinguishable from this case. The nearest case is *Smith v. Salzmann* (8), which is in the appellant's favour. That decision is very near this. I do not think there is anything which taints this promise, and I agree that the appeal should be allowed.

DAVEY, L.J.: I also am of opinion that this appeal should be allowed. I am of opinion that the respondents have entirely failed to show that there has been any fraud on the Court or on the creditors themselves. I should be very sorry that anything which falls from us should in the least degree weaken the salutary rule that those who apply to the Court for an order of this kind must disclose to the Court all facts which it ought to know. But that applies only to material facts, and I fail to see that in this case the material facts were withheld. The functions of the Court seem to me to be confined to seeing that all the creditors (including those who have become assignees of original creditors) have consented to the annulment. Nor can I see that there was any fraud whatever. Each creditor was at liberty to make his own bargain. It was quite unlike the case of a composition deed, the principle of which is that all the creditors are to be treated alike. Unless it can be proved that some creditor was induced to part with his debt for a smaller sum in consideration of Levita having agreed to take 2,000*l.* for his, I fail to see how there could be any fraud upon the creditors. The creditors had consented before the petition was presented, and

each gave his consent, not on account of anything which had taken place between Levita and him, or between Levita and McHenry, but in consequence of the negotiations there had been between McHenry and the several creditors. In that negotiation each creditor of course made the best bargain he could for his own interests.

The cases referred to in argument can be divided into two classes. Where an inducement is offered to one creditor to execute a composition deed or accept a composition on the footing that all the creditors are to share alike, of course it would be an obvious fraud on the other creditors if one were enabled to obtain better terms for himself, and all the more when a specified majority have power to bind the minority. The second class of cases is where a creditor has been induced to withdraw his opposition, or to withdraw a bankruptcy petition, in consideration of some pecuniary advantage. There it has been held that a creditor, in opposing, for instance, the bankrupt's discharge, is acting on behalf of all the creditors generally, and for this reason, that if he did not put himself forward other creditors would do so. He is, in fact, acting in the interest of all; and there is the further reason that it is a matter of public interest that the public examination of a debtor should not be stifled.

I am therefore of opinion that none of the decided cases are adverse to the appellant's argument, and I think the case of *Smith v. Salzmann* (8), which has been referred to by Lord Justice LINDLEY, supports the view we are taking of this case. I am of opinion that the appeal ought to be allowed.

Appeal allowed.

Solicitors: *Linklater, Hackwood, Addison & Brown*, for the Appellant.

Hores & Pattisson, for the Respondent.

IN RE SALAMAN.

1894, March 14. LINDLEY, KAY AND A. L. SMITH, L.JJ.

Solicitor—Costs—Taxation—Separate Retainers—Solicitors Act, 1843 (6 & 7 Vict. c. 73), s. 37.

Where a solicitor is retained separately by a number of persons to take proceedings on behalf of all, each is entitled to have the whole bill of costs taxed, although each such person has only to pay a proportion of the entire amount, without serving any person except the solicitor; but the Court will endeavour to secure a taxation at which all the parties interested are present in order to avoid any subsequent application to tax.

APPEAL from Kekewich, J.

In August, 1889, thirty-five persons, who were shareholders in the Passburg Grain Syndicate, gave separate retainers to Ernest Salaman, a solicitor, to take proceedings on their behalf in the Chancery Division to cause their names to be removed from the register of shareholders of that company on the ground of misrepresentations contained in its prospectus.

On 6 November, 1889, each of the thirty-five persons signed a letter addressed to a committee, consisting of three of their number, in the following terms:—

“*Re* PASSBURG GRAIN SYNDICATE.

“I hereby appoint you and each of you to act on my behalf in any proceedings against the above company, in which I have retained Mr. Ernest Salaman as my solicitor, and I hereby authorize you to instruct him on my behalf as you may be advised, and I agree to conform to and be bound by what you may instruct him to do, and this shall be an authority to Mr. Salaman to take your instructions on my behalf. I also agree, as between myself and the other allottees for whom Mr. Salaman is acting, to bear and pay my share of the whole costs and expenses in proportion to the number of shares held by me.”

Actions were accordingly commenced by Salaman, one of which it was arranged should be tried first as a test action. Contributions in respect of the costs of that action were received by the committee from the several persons, amounting in the aggregate to 2,740*l.*, and that sum was paid over to Salaman.

Bills of costs were delivered by Salaman in February, 1892, amounting to 3,043*l.* (consisting of a general bill for 2,945*l.* and three others), in which credit was given for the 2,740*l.* received by him.

In July, 1892, a summons was taken out in the names of thirty-four of the thirty-five persons (one of them having died) for taxation of the bills of costs. The committee issued the summons, and did so without obtaining the authority of all the thirty-four persons named therein as applicants.

In March, 1893, KEKEWICH, J., made an order that the applicants, fifteen of the persons originally named as such, submitting to pay what, if anything, should be due from them respectively, it should be referred to the taxing-master to tax the bills, and that credit should be given by Salaman for all sums of money received by him, and that there should be an inquiry on that head; and that in taxing the bill for 2,945*l.* the applicants respectively should bear that proportion of the whole bill which the number of shares held by them respectively bore to 3,660 shares.

His Lordship, however, directed that the order was not to be drawn up till evidence was produced that the applicants had communicated with all the other of the thirty-four parties, and they were made respondents to the summons, or were shown to desire to take no further part in the matter.

The applicants endeavoured to comply with this direction, but some of the parties could not be found. KEKEWICH, J., thereupon dismissed the summons.

The applicants appealed.

Swinfen Eady, Q.C. (Gatey with him), for the appellants :

It is a denial of justice to refuse the application to tax the bills of costs in this case. Where retainers are separate, the strict right of each client is to have the whole bill taxed without serving any person except the solicitor: *In re Colquhoun* (1). Taxation of a bill can be ordered in the absence of parties liable for part of it: *In re Allen, Davies v. Chatwood* (2). The liability of each party is limited to his share of the costs: *Burridge v. Bellew* (3).

(1) 5 De G. M. & G. 35; 23 L. J. Ch. 515.

(2) 11 Ch. D. 244; 48 L. J. Ch. 358; 40 L. T. 187; 27 W. R. 485.

(3) 32 L. T. 807.

George White, for the respondent Salaman :

The Court has power to refer this bill for taxation with such directions and subject to such conditions as it thinks proper, the application being under section 37 of the Solicitors Act, 1843, and not made within a month after delivery of the bill.

If the Court thinks that an order for taxation should be made at all, I submit that it should be made in an amended form, so as to do justice not only to the clients, but also to the solicitor. An order to tax a solicitor's bill is irregular where the solicitor has been retained by a number of persons, and they do not all join in the application : *In re Ilderton* (4), *In re Hair* (5). There ought to be only one taxation, and for that purpose all the parties should be served.

No reply was called for.

LINDLEY, L.J. : I think that this is a case in which Mr. Justice KEKEWICH has gone too far. There were thirty-five persons who had a claim against a company in respect of misrepresentations in its prospectus, by which they were induced to take shares. They might have brought thirty-five separate actions against the company ; but, instead of doing so, they combined together and brought a test action. They made arrangements with a solicitor to conduct the action for them, all agreeing to be responsible to him for the aggregate costs, but only proportionately to the number of shares they had respectively taken in the company. And they gave him a retainer, expressed in such a form as to be not a joint but a series of separate retainers, each undertaking to pay his share. A committee was appointed to give instructions to the solicitor, and certain calls were made which brought in a considerable sum to meet the costs of the proceedings. The solicitor having delivered his bill, one of these thirty-five persons says, "I want the solicitor's bill taxed." What is his strict right? It is, no doubt, to have the whole bill taxed, nor is he bound to serve anybody except the solicitor. But if that were done, it follows that each of the thirty-five persons would have the right to have the bill taxed. That would be a circuitous and somewhat cumbrous proceeding, as

it would involve thirty-five taxations. How, then, is the Court to deal with the matter? The bill should be directed to be taxed and, so far as possible, all the other persons served, so that they might have an opportunity of being present. Mr. Justice KEKEWICH endeavoured to do this, and to that extent he was right. He made the order for taxation, but directed it not to be drawn up till evidence was produced that all the persons had been communicated with, and they were made respondents to the summons, or were shown to desire to take no further part in the matter. The applicants endeavoured to comply with the order, but were unable to succeed in serving everybody, as some could not be found. Mr. Justice KEKEWICH thereupon dismissed the summons. Now there he was wrong—he exceeded his jurisdiction. He ought not to have dismissed the application altogether because certain desirable terms could not be complied with. Accordingly it appears to me that this appeal was necessary, and must be allowed. An order must be made for taxation, the appellants submitting to pay what shall appear to be due from them respectively. I think that the solicitor ought to pay the costs of this appeal.

KAY, L.J. : I agree with the learned Judge in the Court below in most of what he has done in this case. I agree with him that the retainers were separate and not joint, and that there should be only one taxation, which should be made with reference to the agreement as to the apportionment of costs. But in the case of *In re Colquhoun* (1) it is expressly stated that where the retainer is a several retainer by a number of persons, each person is entitled to taxation, and may have the whole bill taxed, although he has only to pay a proportion of it. In this case, then, I agree that each has strictly a right to have the whole bill taxed without serving any of the others except the solicitor, in which event there would, of course, be a chance of having another taxation by each of the remaining persons. But any Court would see that it would be best, if possible, to obviate the chance of other taxations. Mr. Justice KEKEWICH did his best to avoid this, and to get all the parties before the taxing-master, and to have them all served. But where I differ from him is in this : that when it was found impracticable to serve all—for at least three of the parties could not be

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discovered—he dismissed the application with costs, without considering the position of the persons applying. Each of those persons had an absolute right to have the bill taxed. But Mr. Justice KEKEWICH's decision does absolute injustice. To say that the solicitor is to escape taxation of his bill because all the other parties cannot be served would be a denial of justice. In such a case as this the Court must do the best it can under the circumstances. I agree with the order made by Lord Justice LINDLEY and also as to the costs.

A. L. SMITH, L.J., concurred.

Appeal allowed.

Solicitors: *Morley, Shirreff & Co.*, for the Appellants.

Ernest Salaman, Fort & Co., for the Respondent.

IN RE ENNIS, COLES *v.* PEYTON.

1893, June 23. LINDLEY, LOPES AND A. L. SMITH, L.JJ.

Principal and Surety—Co-sureties—Contribution.

F. E. & B. entered into a joint and several bond to secure the repayment of a sum lent to F., and it was stipulated that if E. or B. should die F. should within a month procure some other person to enter into a further bond to the like effect. E. died and a fresh bond was executed by F. B. & H. in the same form as the former bonds with the additional proviso that it should not release the heirs, executors, or administrators of E., or in any way alter, vary, or lessen their liability, or affect any right or remedy of the lender under the former bond. B. & H. having paid the debt in equal shares claimed against E.'s estate for half the amount:—

Held, that E.'s estate was liable for one-third only of the amount paid by B. & H.

APPEAL from Kekewich, J.

In 1881 W. Finnie borrowed 2,250*l.* from the Life Association of Scotland, and by a bond dated 14 May, 1881, Finnie, Sir J. Ennis, and L. W. Burnand jointly and severally bound themselves to the association in the sum of 4,500*l.* to secure the repayment of the sum advanced and interest, and also the payment of the premiums on a policy of 3,000*l.* on Finnie's life, effected by him with the

association as collateral security. It was provided by the condition of the bond that if, while any money remained on the security of the bond, Ennis and Burnand, or either of them, should die, or become bankrupt, or go to reside beyond the sea, Finnie should, within one calendar month after such act or event, procure some other substantial person or persons (to be approved of by the association) to enter into a further bond in the like sum and to the like effect as the present bond.

It was declared that Ennis and Burnand, and each of them, their and each of their heirs, executors and administrators, should be bound as fully as if they had been singly bound by the bond as principals, and not as sureties, and that notwithstanding any neglect or delay of the association in seeking to obtain payment from Finnie, "and notwithstanding their accepting any additional bond under the provisions in that respect hereinbefore contained," or not making available any collateral security or giving time to Finnie for payment.

Sir J. Ennis having died on 28 May, 1884, on 21 March, 1885, Finnie, Burnand and W. H. Houldsworth gave the association their joint and several bond for 4,500*l*. It recited the former bond, the death of Ennis, and that "the said association have approved of the said W. H. Houldsworth as the person to enter into a bond jointly with the said W. Finnie and L. Burnand in substitution for the said bond bearing date 14 May, 1881." This bond was in the same form as the first bond, with the following additional clause: "Provided always, that the above-written bond shall not, nor shall anything herein contained, release or discharge the heirs, executors, or administrators of the said Sir J. Ennis from the said sum of 2,250*l*. secured by the said bond of 14 May, 1881, or any part thereof, or in any way alter, vary, or lessen the liability of the heirs, executors, or administrators of the said Sir J. Ennis, or affect any right of action or other remedy the said association, their successors or assigns, now have or shall hereafter have, or be entitled to, under or by virtue of the last-mentioned bond; and further, that as against the said W. Finnie and L. W. Burnand respectively, and all persons deriving title under them respectively, the said last-mentioned bond shall to all intents and purposes remain in full force and effect, and shall and may be enforced in the

same manner in all respects as if the above-written bond had not been executed."

In February, 1886, Finnie was declared a bankrupt; and the association having applied to Burnand and Houldsworth for payment of the principal and interest due under the second bond, they paid the amount in equal shares, and thereupon the bonds and the policy of insurance were assigned by the association to them.

An action for the administration of the estate of Sir J. Ennis was commenced, and Burnand and Houldsworth each made a claim for half the sum he had paid to the association.

On 2 July, 1886, BACON, V.-C., in Chambers, held that they were entitled to prove against the estate of Sir J. Ennis for that amount.

In February, 1893, the chief clerk's certificate was filed, and Burnand and Houldsworth were included among the creditors. The executor then took out a summons asking that the certificate might be varied by certifying that nothing was due to either Burnand or Houldsworth, or, in the alternative, that the estate was only liable to contribute one-third of the amount paid by them to the association. KEKEWICH, J., declined to consider the point on the ground that it had been decided by BACON, V.-C., and dismissed the summons.

The executor appealed.

Warmington, Q.C., and Methold, for the appellant.

Marten, Q.C., and J. Henderson, for Houldsworth, referred to Dering v. Earl of Winchelsea (1), Steel v. Dixon (2), and Craythorne v. Swinburne (3).

Pauli, for Burnand.

LINDLEY, L.J.: This is a case of some difficulty owing to the language of the first bond. Finnie borrowed money from the Life Association of Scotland, and entered into a bond with two sureties for its repayment. The sureties were Burnand and Sir J. Ennis. On the death of Sir J. Ennis the association took another bond, in

(1) 1 Cox, 319; 1 R. R. 41.

(2) 17 Ch. D. 825; 50 L. J. Ch. 591; 45 L. T. 142; 29 W. R. 735.

(3) 14 Ves. 160; 9 R. R. 264.

which Burnand and Houldsworth were the sureties. They have paid the debt, and the question is whether the estate of Sir J. Ennis has been discharged, and if not, then what proportion of the debt it ought to pay.

The original bond is not easy to construe, but I cannot find enough in it to enable me to say that the estate of a deceased surety is released upon a new bond with two sureties being given. I think that the object of the provisions as to a new bond was to secure two solvent living sureties within the kingdom, but not to give up any security the association had. I am satisfied that the giving of a new bond does not release the estate of Sir J. Ennis. His executors were not parties to the new bond, and there was no need that they should be; but the association reserves its rights against them, and there is nothing to release them.

This disposes of the main question. The estate of Sir J. Ennis is liable to contribute, but to contribute what? The decision under appeal makes it liable to contribute half of what Burnand and Houldsworth have paid. I think that is not right. A surety is entitled to the benefit of every security held by the creditor. Suppose the executors of Sir J. Ennis had paid the debt, they would have been entitled to recover two-thirds from Burnand and Houldsworth. The object of the final proviso in the second bond was only to preserve the rights of the association against the estate of Sir J. Ennis, not to fix the amount of the liability of the estate to the other sureties.

LOPES, L.J.: For a long time I was inclined to think that the taking the new bond discharged the estate of Sir J. Ennis; but, on consideration, I do not think that the language of the first bond admits of that construction. If an action had been brought by the association against the executors for the whole amount, their only defence would have been to put in evidence the second bond, and I think that the taking it did not release the estate of the deceased surety. As to the second point, I feel no doubt that the estate of Sir J. Ennis is liable to the other sureties for one-third of the whole sum and no more.

A. L. SMITH, L.J.: The only provisions in the first bond on which the executors of Sir J. Ennis could rely if an action were brought

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against them on the bond would be those as to the giving a new bond. What was the object of those provisions? Was it to release the estate of the deceased surety, or to give a further benefit to the association? In my opinion, the latter only. If a surety dies or goes abroad, a new surety is to be put in, so that the association may always have two sureties in the kingdom who can be applied to, and it would be straining the clause to go further.

As to the other point, it is, to my mind, plain that the liability is divisible in thirds, and that one-third only is to be borne by the estate of Sir J. Ennis.

Solicitors: *Wynne & Son; Rose & Johnson; Wilde, Berger & Moore.*

IN RE CLERGY ORPHAN CORPORATION.

1894, July 24, 26; August 10. LORD HERSCHELL, L.C.,

AND LINDLEY AND DAVEY, L.JJ.

Charity—Endowment—Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), ss. 62, 66—Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), ss. 1, 29, 48.

For the purposes of the Charitable Trusts Act, 1853, sections 62 and 66, (i.) income from any "endowment" means, *primâ facie*, income derived from any invested funds; (ii.) but, in the case of a charity maintained partly by voluntary subscriptions and partly by the income of any endowment, bequests and donations for the general purposes of the charity which may lawfully be applied as income consistently with the terms of the gift are exempt from the jurisdiction of the charity commissioners; (iii.) and such gifts and the income thereof are not brought within the jurisdiction by being invested by the governors.

Consequently, land purchased by a charity, entitled to hold lands, out of the proceeds of sale of the investment of voluntary contributions applicable as income for the general purposes of the charity does not require the consent of the charity commissioners to its being sold.

Governors of the Charity for the Relief of Poor Widows and Children of Clergymen v. Sutton (1) discussed.

APPEAL from Kekewich, J.

The Clergy Orphan Corporation was incorporated in the year 1809 by the Act 49 Geo. III. ch. xviii. under the name of "the Society of Stewards and Subscribers for maintaining and educating poor orphans of clergymen until of age to be put apprentice; and for incorporating such Society; and for more effectually enabling them to carry out their charitable and useful designs."

The Act recited that the society had been formed in the year 1749, and had been supported by the voluntary subscriptions and donations of charitable and well-disposed persons. It empowered the corporation to purchase and hold lands, tenements, or hereditaments or any interest therein for the purposes of the charity, but conferred no express power to sell or let land; and by section 2 the governors were authorized to apply and dispose of the moneys and funds already given, and which should from time to time be contributed, and all other moneys and funds belonging to the corporation, for the purposes mentioned in the Act and for any other purpose relating to the corporation and for the benefit of it, at their discretion.

(1) 27 Beav. 651; 29 L. J. Ch. 393.

In the year 1858 the governors sold out a sum of 6,400*l.* consols, part of a larger sum then belonging to the corporation; and out of the proceeds purchased the reversion of certain land in St. John's Wood, which they then held on lease, and on which a school for the clergy orphans had been erected.

The evidence showed that, at the time of the purchase, the property of the corporation consisted of a general fund arising entirely from voluntary subscriptions, donations, and bequests, and of several funds held upon specific trusts, and that the consols sold out formed part of the general fund.

In 1893 the Manchester, Sheffield, and Lincolnshire Railway obtained an Act of Parliament (Manchester, Sheffield, and Lincolnshire Railway (Extension to London) Act, 1893, 56 Vict. ch. i.) authorising them to acquire compulsorily land for the purposes of their undertaking; and by section 51 of that Act (which incorporated the Lands Clauses Consolidation Act, 1845) it was provided that the railway company "may and shall purchase" and the corporation "may and shall sell" certain lands and property (being a portion of the lands and premises above mentioned) for 40,000*l.*, the price agreed on between the company and the corporation, and that the company might convey such lands and property to the Marylebone Cricket Club in exchange for land of the club taken by the company for its undertaking.

On 18 August, 1893, the railway company, pursuant to section 69 of the Lands Clauses Consolidation Act, 1845, paid into Court a sum of 5,000*l.* on account of the purchase-money, the lands and property being described in the title of the account as belonging to the corporation "without power of sale."

The corporation having presented a petition for payment out to them of the 5,000*l.* as persons absolutely entitled under section 69 of the Lands Clauses Consolidation Act, 1845, which was opposed by the charity commissioners on the ground that the fund represented land which could not be sold without their consent, KEKEWICH, J. held, that he was bound by the decision of Lord ROMILLY in *Governors of the Charity for the Relief of Poor Widows and Children of Clergymen v. Sutton* (1), and that the fund was free from the control of the commissioners, and ordered payment of the fund in Court to the petitioners.

The charity commissioners appealed.

Sir John Rigby, A.-G., and Vaughan Hawkins, for the appellants :

The fund in Court represents an "endowment" within the meaning of the Charitable Trusts Acts, 1853 and 1855 (2). As the

(2) The Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), provides for the appointment of charity commissioners, whom it refers to as "the Board" and empowers to inquire into the condition and management of all charities in England and Wales.

By section 24, the Board may authorise the sale of land belonging to any such charity, if satisfied that such sale will be advantageous to the charity.

Section 62, after exempting from the operation of the Act certain institutions "wholly maintained by voluntary contributions," provides as follows: "And where any charity is maintained partly by voluntary subscriptions and partly by income arising from any endowment, the powers and provisions of the Act shall, with respect to such charity, extend and apply to the income from endowment only, to the exclusion of voluntary subscriptions, and the application thereof; and no donation or bequest unto or in trust for any such charity as last aforesaid, of which no special application or appropriation shall be directed or declared by the donor or testator, and which may legally be applied by the governing or managing body of such charity as income in aid of the voluntary subscriptions, shall be subject to the jurisdiction or control of the said Board, or the powers or provisions of this Act; and no portion of any such donation or bequest as last aforesaid, or of any voluntary subscription, which is now or shall or may from time to time be set apart or appropriated and invested by the governing or managing body of the charity, for the purpose of being held and applied or expended for or to some defined and specific object or purpose connected with such charity, in pursuance of any rule or

resolution made or adopted by the governing or managing body of such charity, or of any donation or bequest in aid of any fund so set apart or appropriated for any such object or purpose as aforesaid, shall be subject to the jurisdiction or control of the said Board or the powers or provisions of this Act."

By section 66, "The expression 'endowment' shall mean and include all lands and real estate whatsoever, of any tenure, and any charge thereon, or interest therein, and all stocks, funds, monies, securities, investments, and personal estate whatsoever, which shall for the time being belong to or be held in trust for any charity, or for all or any of the objects or purposes thereof; and the expression 'land' shall extend to and include manors, messuages, buildings, tenements, and hereditaments, corporeal and incorporeal, of every tenure and description."

The Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), provides by section 1, that "'The Charitable Trusts Act, 1853,' hereinafter called 'the principal Act' and this Act, shall be construed together as one Act, and any provisions of the principal Act inconsistent with this Act are hereby repealed."

Section 29 provides that "It shall not be lawful for the trustees or persons acting in the administration of any charity to make or grant, otherwise than with the express authority of Parliament, under any Act already passed or which may hereafter be passed, or of a Court or Judge of competent jurisdiction, or according to a scheme legally established, or with the approval of the Board, any sale, mortgage, or charge of the charity estate"

authorities at present stand there can be no "endowment" for the general purposes of a charity, but only for specific purposes; *Governors of the Charity for the Relief of Poor Widows and Children of Clergymen v. Sutton* (1), but we attack the construction which Lord ROMILLY put on the Act there. We say that, if a charity purchases land under circumstances such as those in the present case, that land becomes an "endowment." The savings of past generations of a charity constitute an "endowment." Section 44 of the Act of 1853 shows that the endowment for general purposes is regarded as the main thing, though Lord ROMILLY held it not to be an "endowment" at all. Property may be an "endowment" and still be applicable as income. Section 62 is not meant to exempt charities which, like the present one, have accumulated property. The interest of the commissioners arises because, the investment having converted the money into capital, the charity cannot now apply it as income: it had become capital before it was invested in the purchase of the land. After it became land the Court could only invest it in land again, or direct payment out to any party "absolutely entitled" under section 69 of the Lands Clauses Consolidation Act, 1845, and, as that will not include trustees (*In re Smith, Ex parte London and North Western Railway and Midland Railway*) (3), the charity is not entitled to payment out.

[Lord HERSCHELL, L.C.: That case was based on the discretion of the Court merely in directing payment out, and the Court held there was no absolute right in anybody.]

This charity had no power to sell land apart from the Railway Act. The construction put upon the Act of 1853 by Lord ROMILLY in *Governors of the Charity for the Relief of Poor Widows and Children of Clergymen v. Sutton* (1), was wrong; the word "endowment" need not have reference merely to gifts which are restricted to some specific purpose or trust, but there may equally be an "endowment" for general purposes. Lord ROMILLY did not put to himself the right

Section 48 provides that "In the construction of the principal Act and this Act the word 'charity' shall include every institution in England and

Wales endowed for charitable purposes, but shall not include any charity expressly exempted from the operation of the Act of 1853."

(3) 40 Ch. D. 386; 58 L. J. Ch. 108; 60 L. T. 77; 37 W. R. 199.

questions. Other decisions merely followed that case, as *In re St. John Street Wesleyan Methodist Chapel* (4).

Warmington, Q.C., and Dibdin, for the respondents :

Whatever view the Court of Appeal takes of *Governors of the Charity for the Relief of Poor Widows and Children of Clergymen v. Sutton* (1), a good many titles depend on the view there taken.

The charity had power to sell the land, which was purchased out of moneys arising from voluntary subscriptions for general purposes, without the consent of the appellants: *Royal Society of London and Thompson* (5), *Governors of the Charity for the Relief of Poor Widows and Children of Clergymen and Skinner* (6), *Ex parte the Western Synagogue* (7). This charity is maintained by voluntary contributions, although, it is true, it has a number of special funds and trusts for special purposes. "Endowment" in section 62 of the Charitable Trusts Act, 1853, cannot be construed to include voluntary subscriptions, for it is expressly opposed to that phrase in section 62, though it has a very wide definition given to it in section 66, the interpretation section. It would be a very narrow construction of the words "the application thereof" to say that, if the annual subscriptions are spent within the year they are not within the jurisdiction of the appellants, but that if they are not, but are invested, then they are. The fund is income and is not subject to the jurisdiction of the appellants.

S. A. Sampson, for the railway company.

Vaughan Hawkins replied.

Cur. adv. vult.

August 10.

DAVEY, L.J., delivered the judgment of the Court: The real and substantial question on this appeal is whether the Clergy Orphan Corporation is subject to the jurisdiction of the charity commis-

(4) [1893] 2 Ch. 618; 62 L. J. Ch. 927; 69 L. T. 105.

(5) 17 Ch. D. 407; 50 L. J. Ch. 344; 44 L. T. 274; 29 W. R. 838.

(6) 3 R. 161; [1893] 1 Ch. 178; 62 L. J. Ch. 148; 67 L. T. 751; 41 W. R. 461.

(7) 26 S. J. [1882] 435.

sioners and to the provisions of the Charitable Trusts Acts so far as regards their land in St. John's Wood, which is or was the site of their school but has been sold to a railway company under the provisions of an Act of Parliament.

The corporation is undoubtedly a charity within the meaning of the Acts. The question is whether the land and the purchase-money which now represents it are exempted from the jurisdiction of the charity commissioners by the provisions of section 62 of the Charitable Trusts Act, 1853 (2). The first exemption is of charities "wholly maintained by voluntary contributions." It is not contended that the corporation is within this description. But we may observe that, if these words are read in their widest and most liberal meaning every charity in the kingdom would be exempt, for we suppose that the ultimate source of all charitable endowments is to be found in the spontaneous bounty of founders and supporters. The words are, we think, intended to describe a charity which has no invested endowment yielding an income for its support, but is dependent on the gifts of the benevolent, whether recurrent or occasional, and whether *inter vivos* or by will.

The second exemption, which applies to this case, is in the following words. [His Lordship read the provision (2).] Before we proceed to comment on this enactment we ask what is meant by an endowment. The interpretation of this word is given in section 66. [His Lordship read the clause (2).] We can see no sufficient reason for limiting or restricting the meaning of these words, or for confining the words to property held upon some special purpose or trust in connexion with a charity as distinguished from the general purposes of the charity. On the contrary, the words "in trust for any charity, or for all or any of the objects or purposes thereof," seem to us to preclude any such limited construction. We conclude, therefore, that the words mean what they say, and that all property of every description belonging to or held in trust for a charity, and whether held upon trusts or conditions which render it lawful to apply the capital to the maintenance of the charity, or upon trusts which confine the charitable application to the income, is an endowment within the meaning of the Act. We return now to section 62. We observe that the words used are "voluntary subscriptions." We think that these words are used in a popular sense,

and denote recurring gifts repeated annually or otherwise with more or less regularity. Donations or bequests, which would be included as well as subscriptions in the general term contributions, are dealt with in the following sentence. The next words to be noticed are, "partly by income arising from any endowment." Bearing in mind the definition of endowment, we think that these words, if they were not qualified by the subsequent context, would mean, and so far as they are not so qualified do mean, income derived from any invested funds belonging to the charity, and any charity which depends for its maintenance partly on voluntary subscriptions and partly on income from investments would be within the description. The next sentence, however, must be read as a proviso on, or qualification of, the previous enactment, because it is made applicable only to "any such charity as last aforesaid," *i.e.*, to what has been called at the Bar a mixed charity. The effect of this proviso is in our opinion to exempt from the jurisdiction every donation or bequest for the general purposes of the charity, which is given on such terms that the capital may legally be applied for the maintenance of the charity, but to leave subject to the jurisdiction an endowment for general purposes the income only of which is applicable to maintenance. We are further of opinion that, if the exempted donation or bequest or any subscriptions are in fact invested by the governors with the intention that they shall form a permanent fund or endowment, such investments and the income thereof are exempt from the jurisdiction, and such income is excepted from the "income from endowment" in the previous sentence. That this is so is, we think, made clear from the last sentence of the section specially referring to donations, bequests, and voluntary subscriptions which have been invested. This sentence is again a proviso on the immediately preceding words. The effect of it is that the governing body, by appropriating for some specific purpose and investing a donation or bequest, or any subscriptions, which would otherwise be exempt, do not bring such appropriated endowment or the income thereof within the jurisdiction.

We have thus far dealt with the construction of the clause apart from authority. In the case of *Governors of the Charity for the Relief of Poor Widows and Orphans of Clergymen v. Sutton* (1), Lord ROMILLY put a construction on these sections. Although in

the result Lord ROMILLY's conclusion may not differ much from that which we have endeavoured to express, we cannot agree with him in the reasons which he gave for his judgment. We do not think it was a legitimate mode of interpreting the Act first to consider section 62 of the Act and then to construe the interpretation clause by that section. Lord ROMILLY held that the word "endowment" in section 66 applied only to endowments for a special purpose in connexion with a charity and not to endowments for the general purposes of the charity. As we have already said, we cannot agree with this construction of section 66, and we may add that it seems to us inconsistent with other sections, see, for example, section 44. Lord ROMILLY's view has been followed in other cases, but apparently on his authority without the expression of any opinion as to its correctness by the Judges who adopted and followed it. The test whether the property of a charity is an endowment within the meaning of the Act is not whether it is applicable to the general purposes of the charity or only to some specific purpose in connexion with it, although this circumstance may be important in considering whether the endowment is exempt from the provisions of the Act in the case of a charity falling within the description in section 66.

It was not disputed by the counsel for the commissioners that the Consols sold out arose from the investment of subscriptions, donations, and bequests which the governors might have legally applied as income. We cannot hold that these subscriptions, donations, and bequests lost that character by being invested in Consols. Did they lose it when the Consols were sold and the proceeds applied in the purchase of land? It seems at first sight a strong thing to hold that lands purchased and held for the purpose of carrying on the charitable work of the corporation are not part of the permanent capital endowment of the corporation. But we are unable to say that the investment in land altered the character of the funds invested. The retention of the lands was not essential to the existence of the charity, for the corporation might have bought or rented schools elsewhere, or a site for other schools might have been given to them. In these circumstances, we cannot hold that the funds ceased to be legally applicable as income at the discretion of the governors. The governors for the time being could not, we

think, alter the destination of the funds or the trusts upon which they were held by investing them in land, or deprive their successors of the discretion vested in them. We are, therefore, of opinion that the proceeds of the sale of the lands are still applicable as income to the general purposes of the charity, and, therefore, exempt from the jurisdiction of the Commissioners and the powers and provisions of the Charitable Trusts Acts. It is unnecessary to say what would be the case if a charity had no subscription list, and relied for its maintenance wholly on the income of endowments derived from voluntary donations for its general purposes in past years which had been invested and capitalized. We will only observe that it is for those who claim an exemption to make it out, and the provisions of the Act on which we have commented seem to apply only to a charity maintained partly by voluntary subscriptions and partly by income of endowments.

The result of our judgment, therefore, is (i.) that income of any endowment *prima facie* means income derived from any invested funds; (ii.) but that in the case of a charity maintained partly by voluntary subscriptions and partly by the income of any endowment, bequests and donations for the general purposes of a charity which may be lawfully applied as income consistently with the terms of the gift are exempt; and (iii.) such gifts and the income thereof are not brought within the jurisdiction by being invested by the governing body.

There remains the question whether the learned Judge was right in directing payment of the 5,000*l.* to the corporation. The appellants' counsel contended that a charity cannot sell its land by law independently of the Charitable Trusts Acts. We think that statement is too broad. A charitable corporation can sell and pass the legal estate to a purchaser, but he takes it subject to the obligation of showing that the sale was beneficial to the charity and justified by the circumstances: *Attorney-General v. Warren* (8). But we doubt whether this principle is applicable to a case where the land represents the investment of funds which the governors are empowered to apply and dispose of for any purpose of the charity at their discretion. The authorities referred to seem to contemplate a case where the land is part of the permanent endow-

ment of a charity the income only of which is applicable by the governors. We are therefore of opinion that if the money in Court were reinvested in land the governors could sell it at their discretion and apply the proceeds as income, and the learned Judge was therefore right in directing payment to the corporation.

We are of opinion that the appeal should be dismissed.

Appeal dismissed.

Solicitors : *J. M. Clabon*, for the Appellants.

Bridges, Sawtell, Heywood & Co., for the Respondents.

Cunliffes & Davenport, for *R. Lingard-Monk*, Manchester, for the Railway Company.

MINTER v. CARR.

1894, *July 27 ; August 1, 7, 10 ;* LORD HERSCHELL, L.C., AND
LINDLEY AND DAVEY, L.JJ.

*Mortgage—Consolidation—Assignment of Equity of Redemption in one Property—
Subsequent Union of Mortgages.*

A transferee of several mortgages made by the same mortgagor to different mortgagees has, as against a person to whom the equity of redemption of one of the mortgages was assigned prior to the union of all the mortgages in one hand, no right of consolidation.

The right of the assignee of the equity of redemption to resist consolidation is not affected by the fact that he is also puisne mortgagee of some or all of the properties comprised in the mortgages.

Vint v. Padget (1) doubted.

APPEAL from Romer, J.

On 4 February, 1864, James Banks mortgaged to Charles Sedgwick two houses, 1 and 2, Shakespeare Terrace, Folkestone. On 12 July, 1864 (by a mortgage which comprised also other property), Banks further mortgaged the same premises to Walter Stunt, subject to the mortgage to Sedgwick. By various mesne assignments, and ultimately by an assignment of 14 July, 1890, Stunt's mortgage became vested in James Pledge. On 8 October, 1890,

(1) 2 De G. & J. 611 ; 28 L. J. Ch. 21 ; 6 W. R. 641.

Pledge exercised a power of sale contained in Stunt's mortgage, and conveyed the property to the plaintiff, subject to the mortgage to Sedgwick, but otherwise free from incumbrances.

Between 1863 and 1866, Banks mortgaged several other properties to different mortgagees; and between 1871 and 1873, these mortgages, together with Sedgwick's first mortgage of 1 and 2, Shakespeare Terrace, became vested in R. T. Brockman. The defendants to the action were Brockman's executors.

On 3 October, 1884, Banks further mortgaged 1 and 2, Shakespeare Terrace to the plaintiff, and on 27 March, 1885, Banks further mortgaged the same property to Pledge.

On 30 March, 1893, the plaintiff commenced this action, claiming to redeem Sedgwick's first mortgage of 1 and 2, Shakespeare Terrace. The defendants claimed to consolidate all the mortgages on property belonging to James Banks which had become vested in them. On 16 March, 1894, Romer, J. decided that the defendants were not entitled to consolidate, and gave judgment for the plaintiff.

The defendants appealed.

Neville, Q.C., and Edwin Ward, for the appellants:

Section 17 of the Conv. Act, 1881 (44 & 45 Vict. c. 41), applies only to cases where one of the mortgages was made after 1881, and this case depends upon the old law. We say that whenever, as here, all the equities and all the first mortgages have come to the same hands, there is a right to consolidate. The peculiarity of this case is that the equity of redemption was assigned before the mortgages came into the same hands. There is no decision absolutely in point; but in principle, the order of the assignments makes no difference. The doctrine has always been put on the ground of the liability of the estate, not of any personal liability, and therefore there is no reason why the assignee should be in a better position than his assignor. In *Jennings v. Jordan* (2) the mortgagor had parted with the one property before he mortgaged the other.

[LINDLEY, J., referred to *Tassell v. Smith* (3).]

(2) 6 App. Cas. 698, 700; 51 L. J. Ch. 129; 45 L. T. 593; 30 W. R. 369.

(3) 2 De G. & J. 713; 27 L. J. Ch. 694; 6 W. R. 803.

Lord HERSCHELL, L.C., referred to *Borey v. Skipworth* (4).]

There are notes on that case in *Bugden v. Bignold* (5), and in the notes to *Marsh v. Lee* (6). *Vint v. Padget* (1) is also in our favour.

[DAVEY, L.J., referred to *Baker v. Gray* (7), and *Titley v. Davies* (8). *Beeror v. Luck* (9) was not followed in *Harter v. Colman* (10).

Lord HERSCHELL, L.C.: The observations of the Lords in *Jennings v. Jordan* (2), are entirely inconsistent with *Beeror v. Luck* (9).

DAVEY, L.J.: The subsequent equities acquired by the respondent, cannot make his position any worse. May he not say, "I am in the position of Stunt, and none the less that I have other rights also?"

The plaintiff, coming to redeem, cannot say that he comes in respect of one mortgage only: he is the owner of all the estates.

[They also cited *Barnett v. Weston* (11), and *Tweedale v. Tweedale* (12).]

Bramwell Davis, for the respondent:

I am not claiming to deprive the defendants of any right they ever possessed: Stunt could have redeemed 1 and 2, Shakespeare Terrace alone, and I only claim as assignee of his mortgage to be in the same position. There are two distinct rights of redemption, under two separate deeds. It is really a question of merger of securities, and by the general rule, both my rights must be presumed to have been kept alive, because it was obviously for my advantage that they should be. There is no reason why two rights of redemption should not exist in the same person, for a man who is both second and fourth mortgagee of the same property, has two.

(4) 1 Ca. in Cha. 201.

(5) 2 Y. & C. Ch. 377.

(6) White & Tudor L. C. (6th edit.), vol. i., p. 696.

(7) 1 Ch. D. 491; 45 L. J. Ch. 165; 33 L. T. 721; 24 W. R. 171.

(8) 12 Vin. Abr., Mortgage (F), pl. 19, 20, p. 447; 2 Eq. Ca. Abr. 601.

(9) L. R. 4 Eq. 537; 36 L. J. Ch. 865; 15 W. R. 1221

(10) 19 Ch. D. 630; 51 L. J. Ch. 481; 46 L. T. 154; 30 W. R. 484.

(11) 12 Ves. 130; 8 R. R. 319.

(12) 23 Beav. 341.

[DAVEY, L.J.: Yes; but how if he is second and third, or first and second?]

What I contend for is not inconsistent with *Vint v. Padget* (1). But if it is, then I say that that case was wrongly decided. *White v. Hillacre* (18) was a much stronger case than this. The criticisms on *Vint v. Padget* (1) in *Jennings v. Jordan* (2) are in my favour.

[DAVEY, L.J.: I can find no trace anywhere of the doctrine that a man may have two rights to redeem the same property.]

As to my being a *puisne* encumbrancer, it is clear that I cannot lose any right by taking another security on part of the property: *Miln v. Walton* (14). Notwithstanding *Toulmin v. Steere* (15), a mortgagor paying off an incumbrance may keep it alive. *Smithett v. Hesketh* (16) shows that where the plaintiff in a foreclosure action is also a subsequent incumbrancer, he may have a separate period given him to redeem; that is to say, he is treated as having two distinct rights. *Bovey v. Skipworth* (4), on which TURNER, L.J., relied in *Vint v. Padget* (1), is really a case of tacking, not of consolidation. *Vint v. Padget* (1) is the only case that is at all against me.

[Lord HERSCHELL, L.C.: Whether or not [the decision in *Vint v. Padget* (1) has been questioned, much that was said in it certainly has.]

White v. Hillacre (18) is inconsistent with *Vint v. Padget* (1).

[He also cited *Adams v. Angell* (17), *Bird v. Wenn* (18), and *In re Pride, Shackell v. Colnett* (19).]

Ward replied.

Cur. adv. vult.

August 10.

LINDLEY, L.J.: The facts in this case are complicated, but the

(13) 3 Y. & C. Ex. Eq. 597; 8 L. J. Ex. 65.

(14) 2 Y. & C. Ch. 354.

(15) 3 Mer. 210; 15 B. R. 67.

(16) 44 Ch. D. 161; 59 L. J. Ch. 567; 62 L. T. 802; 38 W. R. 698.

(17) 5 Ch. D. 634; 46 L. J. Ch. 352; 36 L. T. 334; 25 W. R. 139.

(18) 33 Ch. D. 215; 55 L. J. Ch. 722; 54 L. T. 933; 34 W. R. 652.

(19) [1891] 2 Ch. 135; 61 L. J. Ch. 9; 64 L. T. 768; 39 W. R. 471.

(LINDLEY, L.J.)

question raised by the appeal is simple. The defendants are first mortgagees of several properties. The plaintiff is entitled to redeem all these properties. He derives his title through Pledge, who was himself entitled to redeem them all. The plaintiff seeks to redeem only one of those properties, viz. 1 and 2, Shakespeare Terrace, on payment of the sum for which alone it was originally mortgaged. The defendants contend that they are entitled to consolidate all their mortgages as against the plaintiff; and they rely on *Vint v. Padget* (1) as an authority in their favour.

The plaintiff's answer to this is two-fold. First, he says *Vint v. Padget* (1) has been virtually overruled by *Jennings v. Jordan* (2) and *Harter v. Colman* (10); and, secondly, he says that before Pledge sold to him, he Pledge paid off and obtained a transfer of a second mortgage (Stunt's) on the property, which the plaintiff desires to redeem, viz., 1 and 2, Shakespeare Terrace, and that, although Pledge had a right to redeem all the properties when he got in Stunt's second mortgage, Pledge had, and the plaintiff still has, the same right to redeem that property as Stunt himself originally had. Mr. Justice ROMER has held that the plaintiff has this right, and that the defendants are not entitled to resist redemption of this property unless all their mortgages are paid off.

The equitable rule which allows a mortgagee of several properties belonging to the same mortgagor to consolidate them against him, is founded in good sense. It is fair and just that a secured creditor should say to his debtor who is in default and has not paid his debts as agreed, "You shall not deprive me of any of my securities without paying me all that is due to me." To extend this doctrine to persons claiming under the mortgagor, after a right to consolidate has arisen against him, is also intelligible if they have notice of the right to consolidate, but the reason of it is not so obvious where they have not. The assignee of an equitable right stands, however, in no better position than his assignor, and this accounts for a still further extension of the original doctrine. But to extend the doctrine still further to a case like *Vint v. Padget* (1), where the purchaser of two properties knew they were subject to mortgages created by the vendor, but mortgages which were not in the hands of the same mortgagee when the purchase was made, was

I think to make an extension very difficult to justify; and I certainly am not prepared to carry the decision in that case further than I am compelled.

The defendants clearly had no right to consolidate against Stunt; and his mortgage was not extinguished when he was paid off, but was assigned as a subsisting security to Pledge, who afterwards sold 1 and 2, Shakespeare Terrace, to the plaintiff. Pledge was at that time entitled to redeem all the properties mortgaged to the defendants. Now, if Pledge could not keep Stunt's mortgage alive as against other incumbrancers, so as to avail himself of Stunt's right to redeem, it would follow that the defendants would be entitled to consolidate their mortgages against Pledge, and therefore against the plaintiff. But the case of *Adams v. Angell* (17) shows that there is no rule of law which compels the Court to hold that Pledge could not keep Stunt's mortgage alive as against other incumbrancers, and if so, and if the case turns on the intention of Pledge, I have no doubt that he intended to keep Stunt's mortgage alive, and that he in fact did so. Consequently I think he might have availed himself of Stunt's right to redeem 1 and 2, Shakespeare Terrace alone. If Pledge could do this, so can the plaintiff. The defendants suffer no more loss by being so redeemed by Pledge, or by the plaintiff, than if they had been redeemed by Stunt. To deny Pledge's or the plaintiff's right to redeem as Stunt could have redeemed, would, in my opinion, be extending the doctrine of consolidation beyond what is reasonable, and beyond even *Vint v. Padget* (1), and this ought not to be done.

Even if, therefore, *Vint v. Padget* (1) is to be regarded as still a binding authority, I am of opinion that the judgment appealed from should be affirmed, and the appeal be dismissed with costs.

The Lord Chancellor asks me to say that he has read this judgment, and concurs in it.

DAVEY, L.J.: I agree in the judgment of the Court, which has been delivered by the Lord Justice. I am not prepared to extend the doctrine of consolidation beyond the extent to which it has been already carried, and I think that to accede to the appellants' argument in the present case, would be an extension of that doctrine. It is clear that the appellants are in no respect

(DAVEY, L.J.)

prejudiced by Pledge having taken a transfer of Stunt's interest in the property, and having sold to the plaintiff under Stunt's power of sale. Pledge was only doing what Stunt might have done, and if the appellants derived any advantage, it would have been only by an accident to the benefit of which they have no claim.

I only desire to say that I do not quite share the Lord Justice's doubts as to *Vint v. Padget* (1). As at present advised, I think that case may be supported on sound principles, but it is unnecessary for us to deal with *Vint v. Padget* (1) in this case, as, even assuming that case to have been rightly decided, we have come to the unanimous conclusion that the appeal fails.

Appeal dismissed.

Solicitors: *Talbot & Tasker*, for the Appellants.

A. R. & H. Steele for *G. W. Haines*, Folkestone, for the Respondent.

SOMERSET v. LAND SECURITIES CO.

1894, August 9. LINDLEY, LOPES AND DAVEY, L.JJ.

Company—Securities deposited in the Land Registry under the Mortgage Debenture Acts, 1865 and 1870—Delivery to Receiver in Debenture-holder's Action—Jurisdiction—Mortgage Debenture Act, 1865 (28 & 29 Vict. c. 78), ss. 3, 4, 6, 7, 10, 16, 41, 46—Mortgage Debenture Act, 1870 (33 & 34 Vict. c. 20), ss. 4, 7, 8, 9, 10.

Where securities belonging to a company have been deposited in the Land Registry under the Mortgage Debenture Acts, 1865 and 1870, there is no jurisdiction to make an order for the delivery out of such securities, either to the company or to a receiver in a debenture-holder's action, except in the cases where provision for such withdrawal is made, either expressly or by necessary implication in the strictest sense, in the Acts themselves. Convenience or saving of expense is therefore no ground for making such an order; and it makes no difference that the company is being wound up.

Semble, there is jurisdiction to make an order for delivery out (*e.g.*) to a purchaser from a receiver duly appointed under the Acts.

APPEAL from Wright, J.

The Land Securities Company, Limited, had under the Mortgage Debenture Acts, 1865 and 1870, lent money on mortgage,

deposited with the registrar of the Land Registry the securities mortgaged to it, and issued debentures secured upon such mortgage securities. The plaintiff, a debenture-holder, commenced a debenture-holder's action against the company, and by a summons in that action dated 9 June, 1894, asked for an order that the registrar should deliver up to the receiver in the action (who was also the liquidator in the winding-up of the company) all deeds and documents in his possession by virtue of the provisions of the Mortgage Debenture Acts. The registrar contended that in the events which had happened the Court had no jurisdiction to make such an order.

On 28 June, 1894, WRIGHT, J. directed that a summons should be taken out, and an order obtained for the appointment of a receiver, under the Mortgage Debenture Acts, and that the summons of 9 June, 1894, should be further intituled in the matter of those Acts, and subject thereto made the order asked for.

The registrar appealed.

Ingle Joyce (with him *Sir John Rigby, A.-G.*), for the appellant :

Neither Act confers any jurisdiction to make such an order as the learned Judge has made. By section 10 of the Act of 1865 the securities deposited are to be retained by the registrar "until withdrawn as hereinafter provided." Section 7 of the Act of 1870 is to the same effect. Section 16 of the earlier, and sections 8, 9, and 10 of the later Act, contain the provisions for withdrawal, and none of those sections has any application to such a case as this.

Farwell, Q.C., and *Kirby*, for the applicant :

If you could only get your securities out on discharge you would in many cases never get them at all, and therefore the earlier sections could never take effect. Sections 41, 46 of the Act of 1865 deal with the appointment and duties of a receiver. The learned Judge was right in holding that when a receiver is appointed, jurisdiction to order delivery of the deeds to him is impliedly given. That certainly is the most convenient construction, and will save considerable expense.

Rowden, for the defendant company and its liquidator (who

was also the receiver already mentioned), supported the order of the learned Judge.

Ingle Joyce was not called upon to reply.

LINDLEY, L.J. : In the present case the real difficulty arises from this, that here the Land Registry is a public office, and the registrar is a public officer, and that in section 10 of the Act of 1865, which is still unrepealed, there is this clause : “ Which deeds or documents shall be deposited with the registrar, to be retained by him until withdrawn as hereinafter provided.” What power has this Court to direct the registrar to deliver these deeds unless they are “ withdrawn as hereinafter provided ” ? I can understand that it would be right in principle to hold that when you have regard to the purposes of the Act and find that they are all satisfied, a necessary implication may arise that there is jurisdiction to order that the deeds be delivered up. But we are far short of that here, and we are asked to say that because there is a winding-up and a debenture-holder’s action, and because a receiver and liquidator has been appointed, he is entitled to have the deeds delivered up to him. It might be convenient or it might not to do that, but there is no necessary implication to the effect that this deposit of deeds has answered all the purposes for which it was made. I think the learned Judge’s order must be discharged.

LOPES, L.J. : I am of the same opinion. I see no way of getting over the words of section 10 of the Act of 1865, which provides for the documents being retained “ until withdrawn as hereinafter provided.” Moreover, section 8 of the Act of 1870 contains express provisions for the re-delivery of the deeds to the company in the case of redemption ; but there is no provision for delivery applicable to the present case.

I think the appeal must be allowed.

DAVEY, L.J. : I am of the same opinion. *Mr. Ingle Joyce*, in opening this case, very properly stated that he raised no question of form, and that if in any form of proceeding the order could be made he did not object to it. But I am of opinion that there is no form of proceeding in which this order can be made. The registrar is a public officer, and the only jurisdiction the Court could have

over him would be to enforce by *mandamus* or otherwise the performance by him of that which it is his duty to do. Where is the duty of the registrar to hand over these deeds to the receiver in a debenture-holder's action? I do not understand that in the receiver's affidavit or in the argument for the respondent it was put forward that there was any such duty on the registrar. The highest it was put at was that it would be extremely convenient that this order should be made, and that it is usual in cases like this where there is no such Act of Parliament, and the documents are not in the custody of a public officer, to hand over the documents to a receiver. This Act is very peculiarly framed, for those who framed it apparently never contemplated the possibility of the company being wound up or of a mortgagee finding it necessary to realise his security by exercising his power of sale, and there are no express provisions for such cases. But I think that, inasmuch as the existence of that very ordinary and well-known state of circumstances must have been within the contemplation of the legislature, whatever is by necessary implication—and I use the words deliberately—to apply to such a case ought to be implied although it is not expressed. In section 46, for example, though it does not in terms contemplate realisation by sale, I think it must be taken that the receiver might sell; and in that event I think, although there is no express provision, it necessarily follows from the provisions of the Act that the deeds, which would no longer be the deeds of the company or the mortgagor, but would by the exercise of the power of sale have become the property of the purchaser, ought to be delivered out to the purchaser. I should have no difficulty in such a case in making an order upon the registrar that he should deliver out to the purchaser from the company the deeds relating to property which had been so sold; but I am not at all disposed to imply any powers or any directions in the Act for delivery up of the deeds where the implication of such powers or directions is not necessary to effect the purpose of the Act. Where *Mr. Farwell* wholly failed to satisfy my mind was when he argued that the delivery of these deeds was necessary for the purpose of enabling the receiver or liquidator, or whoever the officer may be, to realise the securities held by the company. On the contrary, I can see a great convenience in securities of this large value remain-

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ing in the custody of a public officer and in a safe place. In my opinion the security of the debenture-holders, which was the primary cause of the Act, must be conceived to have been the principal object of the legislature in directing these deeds to be deposited with the registrar. That protection is required just as much after winding-up as before, until the securities are realised or the debenture-holders paid off. It may occasion some small additional expense, but I am satisfied we ought not to make this order unless we can find something in the Act which authorizes, and makes it the duty of, the registrar to hand over the documents to the company.

Appeal allowed without costs.

Solicitors : *Solicitor to the Treasury*, for the Appellant.

Ashurst, Morris, Crisp & Co., for the Applicant.

R. C. Ponsonby, for the Defendant Company and the Liquidator.

HOLLINRAKE v. TRUSWELL.

1894, July 9 ; Aug. 8. LORD HERSCHELL, L.C., AND LINDLEY AND DAVEY, L.JJ.

Copyright—Book—Map, Chart or Plan—Sleeve Chart—Literary Merit—Originality—5 & 6 Vict. c. 45, ss. 1 and 2.

A sleeve chart which consists of a piece of cardboard in the shape of a sleeve with certain curved lines and figures printed upon it is not the subject of copyright under 5 & 6 Vict. c. 45.

APPEAL from Wright, J. (sitting as an additional Judge of the Chancery Division).

The action was brought by the plaintiff, Mrs. M. A. Hollinrake, of Oxford Street, London, as assignee under an assignment in writing dated 1 February, 1891, from one E. G. Kendall, of "the copyright in a book, to wit, a map, chart, or plan entitled the Cosmopolitan Sleeve Chart," the defendant being Mrs. J. E. Trus-

well, of Nottingham, and being also, like the plaintiff, a dressmaker and professor of scientific dressmaking. The chart, which consisted of a piece of cardboard shaped like a sleeve, and had certain lines and figures printed on it, was invented by Kendall, and registered by him in 1886 under the Copyright Act (5 & 6 Vict. c. 45). The defendant had published and sold a similar chart called "The Ideal," which the plaintiff alleged was a copy of the Cosmopolitan Sleeve Chart, and she accordingly claimed an injunction to restrain the defendant from infringing her copyright in the said sleeve chart.

WRIGHT, J., on 18 March, 1893, held that the plaintiff's sleeve chart was capable of registration under the Copyright Act, as being a chart or plan, which need not necessarily be topographical, and that the defendant had infringed the plaintiff's copyright, and he granted a perpetual injunction against the defendant.

The defendant appealed.

Bramwell Davis, for the appellant :

This sleeve chart cannot be registered under the Copyright Act. The mere fact that it is called a chart would not make it one unless it has some literary merit. An attempt was made to patent a similar chart, but Mr. Justice GROVE, in 1885, held that the patent was bad: *Philpotts v. Hanbury* (1). In *Stannard v. Lee* (2), JAMES, L.J., treated charts as analogous to maps or plans, which are literary works. There are a number of cases as to what is the proper subject of copyright, and they all show that there must be some literary merit.

[DAVEY, L.J.: Or at least some brain work. In the Directory case, *Kelly v. Morris* (3), it was held that although the names of streets and inhabitants of streets are things *publici juris*, you cannot copy your neighbour's work in respect of them.]

A code was held to be the subject of copyright. What is there of literary merit about this thing? It is just like a foot-rule, and

(1) 2 Pat. Cas. Rep. 33.

(2) L. R. 6 Ch. 346; 40 L. J. Ch. 489; 24 L. T. 459; 19 W. R. 615.

(3) L. R. 1 Eq. 697; 35 L. J. Ch. 423; 14 L. T. 222; 14 W. R. 496.

could that be registered under the Literary Copyright Act? This is a mere mechanical contrivance for enabling a person to cut out sleeves. In *Page v. Wisden* (4), a cricket scoring-sheet was held not the proper subject of copyright; also a cardboard puzzle in connection with the picture "Ecce Homo:" *Cable v. Marks* (5). The object of the Act is to protect literary work, although a single sheet might be registered.

[DAVEY, L.J.: You cannot have copyright in the name of a book.]

No: *Dicks v. Yates* (6), where the title was "Splendid Misery." *Maple & Co. v. Junior Army and Navy Stores* (7) was the case of an illustrated catalogue.

[DAVEY, L.J.: That case is the one most against you. It was there held that the illustrations might be the subject of copyright, although there was no such letterpress as could be the subject of copyright.]

The pictures there convey something to the mind. But here the chart would be absolutely unintelligible without instructions. With an engraving or a print the case is different. I admit that a book of logarithms would be absolutely unintelligible without instructions. In *Davis v. Comitti* (8), letterpress on the face of a barometer was held not the subject of copyright.

[Lord HERSCHELL, L.C.: It was never intended to be separately used, but only with a barometer. Here it is intended to be separately used.]

Yes. An illustrated album for photographs, the "Castle Album," was decided not to be a book within the Act: *Schore v. Schmincké* (9). A ballot paper was held not to be the subject of copyright under

(4) 20 L. T. 435; 17 W. R. 483.

(5) 52 L. J. Ch. 107; 47 L. T. 432; 31 W. R. 227.

(6) 18 Ch. D. 76; 50 L. J. Ch. 809; 44 L. T. 660.

(7) 21 Ch. D. 369; 31 W. R. 70.

(8) 54 L. J. Ch. 419; 52 L. T. 539.

(9) 33 Ch. D. 546; 55 L. J. Ch. 892; 55 L. T. 212; 34 W. R. 700.

the Copyright of Designs Act, 1862: *Kenrick & Co. v. Lawrence & Co.* (10). In *Hildesheimer v. Dunn* (11), a cardboard gloved hand with lines of life of palmistry on the palm, and verses on the back of the hand, was registered under both acts, and the whole thing was held to be copyright. The verses there were not taken by the defendant. This thing is not merely directions or instructions, but it is intended to be an apparatus for cutting out actual paper patterns. The injunction is rather wide in its terms, for it prevents us from in any way dealing with the Ideal Sleeve Chart. As to whether this can be said to have been an original work in 1886, when it was registered, the evidence went to show that it had been anticipated. In order to be an infringement the appellant's chart ought to be an exact copy or colourable imitation of the chart in question.

[Lord HERSCHELL, L.C.: The question is very well put in the American case, *Drury v. Ewing* (12), cited in *Drone on Copyright*, p. 143.]

Taking the American decision, your Lordships ought to decide that this is not a colourable imitation. The words are not the same, and although no doubt the measurements are and must necessarily be the same, no person can claim a monopoly in the human arm. The evidence shows that our plan, by reason of the new lines invented being at a different angle, does away with the wrinkling of the sleeve at the elbow, which was the defect in the plaintiff's chart.

A. J. Walter, for the respondent :

The chart in question comes absolutely within the words of the Act, *i.e.*, it is a map, chart, or plan. If it had been drawn in a book, with instructions how to cut out the pattern, the appellant could not have taken part out and published it. As to the question of literary merit, according to *Maple's case* (7), protection is not limited to literary merit, but extends to cases where brain work is bestowed upon the matter. If a series of logarithmic tables were

(10) 25 Q. B. D. 99 ; 38 W. R. 779.

(11) 64 L. T. 452.

(12) 1 Bond (U.S.) 540.

published in one book and instructions in another, could it be argued that the first part could not be copyrighted? If a chart or an architect's plan were given to an unskilled person it would admittedly convey nothing to such an unskilled person. In all previous systems of sleeve-cutting certain measurements only as to the upper portion of the arm were given. If the information in this chart was written it could not be contended that it was incapable of being copyrighted, and for those educated up to it the respondent has written instructions in line language. In *Maple's case* (7), JESSEL, M.R., held that the illustrated catalogue was the subject of copyright, and that the engravings were protected, for it was a book, and he added that there might be such things as picture books for those who could not read letterpress. This is another type of picture book, conveying information to the minds of persons by lines and curves.

In the same case, LINDLEY, L.J., says that originality, and not skill or merit, is the test of copyright. Here there is strong evidence of original matter. The chart is the product of mental effort, and in *Trade Auxiliary Co. v. Middlesboro', &c. Tradesmen's Protection Association* (13), LINDLEY, L.J., held that productions must be in some sense original when their author has bestowed some brain work upon them. As to *Page v. Wisden* (4), the evidence there was that everything was old except the writing as to the fall of each wicket. In the *Christograph case* (5) the shadow charts were known for centuries. In the *Barometer case* (8) the letterpress was never intended to be separately published, and the question was decided apart from the law altogether. Only the words were taken in the *Castle Album case* (9). A cemetery catalogue has been held to be the subject of copyright: *Grace v. Newman* (14). The American case (12) is almost identical with this case. In Copinger on Copyright, 2nd ed., p. 293—4, books on mathematics, algebra, or hieroglyphics are entitled to copyright.

[Lord HERSCHELL, L.C.: As, for example, hieroglyphics in shorthand. I call your attention to the wide terms of the injunction.

(13) 40 Ch. D. 435; 58 L. J. Ch. 293; 60 L. T. 681; 37 W. R. 337.

(14) L. R. 19 Eq. 623; 44 L. J. Ch. 298; 23 W. R. 517.

LINDLEY, L.J.: The ordinary form follows the language of the Act. This goes a great deal too far.

DAVEY, L.J.: The words are "held for the purpose of being used:" *Cooper v. Whittingham* (15).

LINDLEY, L.J.: There must be a common form in the terms of the Copyright Act. Why invite us to go further than the Act?

I think "restrained from printing or publishing" will be sufficient.

[LINDLEY, L.J.: The definition clause I have always understood covers the injunction.]

Bramwell Davis replied.

Cur. adr. vult.

August 8.

LORD HERSCHELL, L.C.: This action was brought by the plaintiff as assignee under an assignment in writing of 1 February, 1891, from one Edmund George Kendall "of the copyright in a book, to wit, a map, chart, or plan, entitled *The Cosmopolitan Sleeve Chart*," 1886. The copyright and assignment were both duly registered at Stationers' Hall. The plaintiff alleged that the defendant had infringed her copyright in the *Cosmopolitan Sleeve Chart* by the printing, publishing, and sale of a large number of sleeve charts called *The Ideal*, those sleeve charts being copies of the plaintiff's *Cosmopolitan Sleeve Charts*. Mr. Justice WRIGHT, before whom the action was tried, granted a perpetual injunction, restraining the defendant from manufacturing or causing to be manufactured, printing, selling, offering for sale, or in any manner using or dealing with a sleeve chart, called the *Ideal*, or any other sleeve chart being a colourable or obvious imitation of the plaintiff's registered copyright sleeve chart. From this judgment the defendant has appealed, on the ground that the plaintiff is not protected by the Copyright Act, the so-called sleeve chart not being a subject matter in respect of which copyright protection can be obtained under that Act. The words and figures for which the

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plaintiff is alleged to have obtained such protection consist of the words "top curve line; under curve line; under arm curves; measure round the thick part of the arm; measure round the thick part of the elbow; measure round the knuckles of the hand;" together with certain curved lines in connexion with the words "under arm curves" and certain scales of inches and half inches in connexion with the words "measure round the thick part of the arm" and "measure round the thick part of the elbow." All these are printed on a piece of cardboard, so curved as to represent the parts of the arm above and below the elbow, which is called the Cosmopolitan Sleeve Chart. I cannot do better than take Mr. Justice WRIGHT's account of the purpose intended to be served by the cardboard, with these words and scales upon it. After pointing out that, for the purpose of accurately measuring the inner part of a sleeve, so as to make it bear its due relation to the outer part, it was formerly necessary to make certain calculations, of a simple character indeed, but still leaving room for error, he said that the plaintiff's so-called chart embodied a method of dispensing with any computation and any measurement beyond the simple measurement of the actual arm. This was accomplished by holes made in the cardboard opposite each half inch of the scales, referring to the measurement round the thick part of the arm and of the elbow respectively, so that by means of these holes pencil marks might be made on a card or paper placed underneath the chart at the proper points in the scales of inches, and the required lines might thus be drawn. Mr. Justice WRIGHT thought that the plaintiff's pattern did not come within the words "book" or "letterpress." The only words that appeared to fit it at all were, in his opinion, "map, chart, or plan." He thought that a map, chart, or plan need not be topographical, and that what the plaintiff had registered might be regarded either as a chart or plan of the female arm in relation to dressmaking, or as the plan of a pattern or model sleeve. Now I have to observe, in the first place, that no one could claim a monopoly of the use of such a sentence as "measure round the thick part of the arm," or of a half-inch scale. And the words and figures found on the "chart" do not in combination convey any intelligible idea, nor could they be of the slightest use to anyone,

apart from the cardboard upon which they are printed. The object of the Copyright Act was to prevent anyone publishing a copy of the particular form of expression in which an author conveyed ideas or information to the world. These may be retained by anyone, though the book, map, or chart which has embodied them has passed out of his possession. If he were to commit to memory the contents of the book, or the information disclosed by the map or chart, he would be as much in possession of the author's ideas or information as if the book, map, or chart were physically in his hands. But this is not the case with the words or figures upon the sleeve chart. They are intended to be used, and can only be of use, in connexion with that upon which they are inscribed. They are not merely directions for the use of the cardboard, which is in truth a measuring apparatus, but they are a part of that very apparatus itself, without which it cannot be used, and except in connexion with which they are absolutely useless. I think it is clear, therefore, that what the plaintiff has sought to protect under the Act for the protection of literary productions is not a literary production, but an apparatus for the use of which certain words and figures must necessarily be inscribed upon it. It is quite true that, notwithstanding the words of the preamble, the protection of copyright may be obtained for works which cannot be said, in the ordinary sense of the term, to have literary merit. Compilations such as the Post Office Directory have, no doubt, properly been held to be the subject of copyright, but there is, as I have pointed out, a marked distinction between these and the claim of protection under the Copyright Act for words and figures inscribed on and necessarily forming part of an apparatus or tool. It is not necessary to determine whether such an apparatus as that now in question could be the subject of letters patent as an invention, though I am far from saying that it could not be so, if novel. One can conceive not a few kinds of apparatus clearly patentable, the use of which necessarily required as part thereof the inscription upon them of words or figures. If a patent were obtained, its duration would be limited to fourteen years, but, if the plaintiff's contention in the present case were well-founded, the patentee would only have to register these words and figures under the Copyright Act in order to obtain the much longer

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protection which is accorded to literary works. These considerations satisfy me that the decision pronounced in favour of the plaintiff cannot be supported. I think that the judgment should be reversed and the action dismissed, with costs.

LINDLEY, L.J.: This is an appeal by the defendant from a decision of Mr. Justice WRIGHT, granting an injunction restraining the defendant from infringing the plaintiff's copyright in a thing called the *Cosmopolitan Sleeve Chart*. The appeal raises two questions—viz., (i.) whether the thing is one in which copyright can be had, and, (ii.) if it is, whether the defendant has infringed it. The first question is one which, so far as I know, is quite new in this country, although it has arisen in America, and been decided there in the plaintiff's favour: see *Drury v. Ewing* (12). The thing in question consists of certain lines and figures printed on a piece of cardboard with the following words upon it: "Top curve line; under curve line; under arm curves; measure round the thick part of the arm; measure round the thick part of the elbow; measure round the knuckles of the hand." The evidence shows that what is on the cardboard is not intended simply to be understood by persons who wish to learn how to cut out sleeves, but that the cardboard itself is intended for use in cutting them out. This at once distinguishes this particular thing from every publication which is generally understood to come under the definition of the word "book" in the Act 5 & 6 Vict. c. 45, s. 2—viz., "volume, part or division of a volume, pamphlet, sheet of letterpress, sheet of music, map, chart, or plan separately published." The learned Judge considered that this thing was a map, chart, or plan; but, if so, it is a very peculiar one, for the use of it lies, not in the information conveyed by it, but in such information combined with the material on which the information is printed. The thing is in truth a measuring machine, and no more a chart or plan within the Literary Copyright Act than is a scaled ruler such as is found in any mathematical instrument case. Such a thing may, if novel and useful, be a good subject-matter for a patent. But I cannot bring myself to hold that it is a map, chart, or plan within the meaning of the Copyright Act. In *Philpotts v. Hanbury* (1) Mr.

Justice GROVE decided that a patent obtained by Philpotts in 1882 for a similar thing was bad, for want of novelty and for insufficiency of the specification. But he did not decide that such a thing as this, if new, could not be the subject-matter of a patent. A new and useful machine, or tool, or apparatus for measuring, would be patentable, but at the present day novelty would probably be difficult to establish. I am not aware of any English authority which throws any real light on the applicability of the Copyright Act to such a thing as this. The American case to which I have referred arose on a motion to commit for a breach of an injunction; and although the learned Judge thought the case might come within the American Copyright Act, yet all he had to decide was whether the defendant had committed a breach of the injunction, and, this being proved, it was not necessary for him to decide more. There is no report of the case when heard in the first instance on the merits, and the case has been doubted in America by the Supreme Court in *Baker v. Selden* (16). The character of what is published is the test of copyright. If what is published is not separately published, is not a publication complete in itself, but is only a direction on a tool or machine, to be understood and used with it, such direction cannot, in my opinion, be severed from the tool or machine of which it is really part, and cannot be monopolized by its inventor under the Copyright Act. The register of the so-called copyright of the plaintiff in this case runs thus: "Title of book, the *Cosmopolitan Sleeve Chart*, 1886." When the real character of the thing is ascertained, it proves to be a measuring tool or machine to which, in my judgment, the Copyright Act has no application.

Under these circumstances it is unnecessary to consider the question of infringement. But here again the plaintiff appears to me to fail. The defendant may have got her own idea from the plaintiff's chart, but the defendant has not copied more than the plaintiff's method of measuring. Copyright, however, does not extend to ideas, or schemes, or systems, or methods; it is confined to their expression; and if their expression is not copied the copyright is not infringed. The case of *Baker v. Selden* (16), already referred to, illustrates this very well. It was there held that the

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author of a system of bookkeeping was not entitled to any monopoly in the system, but was only entitled to prevent other persons from copying his description of it. This is an attempt to use the Copyright Act for a purpose to which it is not properly applicable, and the appeal must be allowed, with costs here and below.

DAVEY, L.J. : In this case the plaintiff, as assignee of one Edmund George Kendall, claims copyright in what is described in the statement of claim as "a book, to wit, a map, chart, or plan entitled the Cosmopolitan Sleeve Chart, 1886." The question is whether the plaintiff can have copyright in the thing so described. The Act 5 and 6 Vict. c. 45 gives copyright, *i.e.*, the right of multiplying copies in books, and by section 2 it is enacted that "a book shall be construed to mean and include every volume, part, or division of a volume, pamphlet, sheet of letterpress, sheet of music, map, chart, or plan separately published." I agree with the learned Judge that a map is not confined to what is popularly known as a map, *viz.*, a geographical map; and a chart is not confined to what is popularly called a chart, *viz.*, a map of a portion of the seas, showing the rocks, soundings, and such like information for the use of navigators. But I cannot agree with him that the cardboard before us is either a map, chart, or plan within the Act. There may, no doubt, be an anatomical or physiological plan showing the structure and distribution of the muscles and bones of the human arm, or any other part of the human frame, which would be protected by the Copyright Act, but this so-called chart does not seem to me to be of that character, or to be the proper subject of copyright. The preamble of the Act recites that it is expedient "to afford greater encouragement to the production of literary works of lasting benefit to the world." And although I agree that the clear enactment of a statute cannot be controlled by the preamble, yet I think that the preamble may be usefully referred to for the purpose of ascertaining the class of works it was intended to protect. Now, a literary work is intended to afford either information and instruction or pleasure in the form of literary enjoyment. The sleeve chart before us gives no information or instructions. It does not add to the stock of human knowledge, or give, and is not designed

to give, any instruction by way of description or otherwise. And it certainly is not calculated to afford literary enjoyment or pleasure. It is a representation of the shape of a lady's arm, or more probably, of a sleeve designed for a lady's arm, with certain scales for measurements upon it. It is intended, not for the purpose of giving information or pleasure, but for practical use in the art of dressmaking. It is, in fact, a mechanical contrivance, appliance, or tool for the better enabling a dressmaker to make her measurements for the purpose of cutting out the sleeve of a lady's dress, and is intended to be used for that purpose.

In my opinion it is no more entitled to copyright as a literary work than the scale attached to the barometer in *Davis v. Comitti* (8). The plaintiff is really seeking a monopoly of her mode of measuring for sleeves of dresses under the guise of a claim to literary copyright. The fallacy of the learned counsel's argument seems to me to lie in a failure to distinguish between literary copyright and the right to patent an invention. No doubt you may have copyright in the description of an art, but having described it you give it to the public for their use, and there is a clear distinction between the book which describes and the art or mechanical device which is described. I agree with what is said in the American case of *Baker v. Selden* (16): "Where the art cannot be used without employing the methods and diagrams used to illustrate the book or such as are similar to them, such methods or diagrams are to be considered as necessary incidents to the art, and given therewith to the public, not given for the purpose of publication in other works explanatory of the art, but for the purpose of practical application." In that case it was held that a man could not have copyright in the model pages of an account book contained in a work explaining a peculiar system of book-keeping. I know not whether this mode of cutting out sleeves could or could not have been patented. But of this I am sure that the plaintiff, if she wished to protect it, should have had recourse to the patent law, and not to the law of copyright. I have said nothing on the question whether the defendant's chart is an infringement of the plaintiff's, and it is not necessary in the view which I take of the case to do so, but I do not disagree with what has been said by Lord Justice LINDLEY. I am of

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opinion that the appeal should be allowed, and the action dismissed with costs.

Appeal allowed.

Solicitors: *H. S. Holt* for *H. P. Day*, Nottingham, for the Appellant.

Firth & Co., for the Respondent.

IN RE BROWNE.

1894, July 30; Aug. 6. LINDLEY, LOPES, AND DAVEY, L.JJ.

Lunacy — Practice — Person incapable of Managing his Affairs — Mental infirmity arising from Age—Master—Order—Receiver of Dividends only—Securities not transferred into Court—Jurisdiction—Lunacy Act, 1890 (53 Vict. c. 5), ss. 108, 116, subs. 1 (d) subs. 2, ss. 120, 133, 137, 146, 333—Lunacy Act, 1891 (54 & 55 Vict. c. 65), s. 27, subs. 4—Rules in Lunacy, 1892.

Where a person is, through mental infirmity arising from disease or age, incapable of managing his affairs, a master in lunacy has jurisdiction to appoint a receiver of the dividends of government and other securities without ordering a transfer of such securities into the name of the receiver.

Although a Judge has jurisdiction to appoint a receiver of dividends only, the usual practice both in Chancery and Lunacy, namely—to order the securities to be transferred into Court and to allow the receiver to obtain the dividends from the paymaster-general, ought not without sufficient reason to be departed from, but ought in general to be adhered to.

On 24 May, 1894, Master Bulwer, one of the Masters in Lunacy, made an order on the application of Miss Mary Anne Browne, a niece and one of the next of kin of Miss Frances Browne, who is eighty-four years of age and very infirm. The order was intituled: "In the matter of Frances Browne, spinster, and in the matter of the Acts 53 Vict. c. 5; and 54 & 55 Vict. c. 65;" and provided (*inter alia*) as follows: "And it having been established to my satisfaction that the said Frances Browne is a person who through mental infirmity arising from age is incapable of managing her affairs, I do order that upon the certificate of the said Master that she has completed her security, the said Mary Anne Browne be and hereby is authorized, on behalf of the said Frances Browne, to

receive and give a discharge for the dividends accrued, and to accrue upon the undermentioned securities standing in the name of the said Frances Browne." Among the securities referred to were certain sums of Colonial Inscribed Stocks registered in the name of Miss Frances Browne in the books of the Bank of England, the dividends on which had been paid there. The Bank objected to act upon the order, on the ground that it was wrongly intituled, and further that the Master had no jurisdiction to make it under the Lunacy Acts (1). The matter now came on to be heard upon the objections of the Bank.

(1) The material sections of the Lunacy Act, 1890 (53 Vict. c. 5) are as follows:—

Section 108, subs. 2: "The Judge in Lunacy may make orders for the custody of lunatics so found by inquisition, and the management of their estates, and every such order shall take effect . . . as to the custody of the estate, upon the master's certificate of completion of the committee's security."

Subs. 3: "Where upon the inquisition it is specially found or certified that the person to whom the inquisition relates is of unsound mind so as to be incapable of managing his affairs, but that he is capable of managing himself, and is not dangerous to himself or to others, the Judge in Lunacy may make such orders as he thinks fit for the commitment of the estate of the lunatic and its management . . ."

Section 116, subs. 1: "The powers and provisions of this part of this Act relating to management and administration apply:—

- (a) To lunatics so found by inquisition;
- (b) To lunatics not so found by inquisition for the protection or administration of whose property any order has been made before the commencement of this Act;
- (c) To every person lawfully detained as a lunatic though not so found by inquisition;

(d) To every person not so detained and not found a lunatic by inquisition, with regard to whom it is proved to the satisfaction of the Judge in Lunacy that such person is through mental infirmity arising from disease or age incapable of managing his affairs . . ."

Subs. 2: "In the case of any of the above-mentioned persons not being lunatics so found by inquisition, such of the powers of this Act as are made exercisable by the Committee of the estate under order of the Judge shall be exercised by such person in such manner and with or without security as the Judge may direct, and any such order may confer upon the person therein named authority to do any specified act, or exercise any specified power, or may confer a general authority to exercise on behalf of the lunatic, until further order, all or any of such powers without further application to the Judge."

Section 120 deals with the powers exercisable by the committee of the estate of a lunatic under an order of the Judge.

Section 124: "The committee of the estate or such person as the Judge approves, shall, in the name and on behalf of the lunatic, execute and do all such assurances and things for giving effect to any order under this Act as the Judge directs, and every

Latham, Q.C., for the Bank of England :

The title of the order ought to show lunacy on the face of it. The master had no jurisdiction to make the order: Lunacy Act, 1890, s. 116, subs. 1 (d); Lunacy Act, 1891, s. 27, subs. 4. The powers under section 116 only mean powers of management and administration. The vesting order clauses are not included. If section 133 is not included, the sale must be carried out by the High Court: section 124. Even if section 133 applies, it does not help, because it only relates to the stock of a lunatic, and under it the dividends cannot be separated from the stocks. That would be inconvenient for the Bank, who in regard to these stocks are mere agents.

[LINDLEY, L.J.: Suppose an order were made under s. 133, would there be an order to receive dividends? Would not that follow?]

That section refers to back dividends.

[LINDLEY, L.J.: In section 133 "fit person" is equivalent to

such assurance and thing shall be valid and effectual, and shall take effect accordingly, subject only to any prior charge to which the property affected thereby at the date of the order is subject."

Section 133: "Where any stock is standing in the name of, or is vested in, a lunatic beneficially entitled thereto . . . then the Judge may order some fit person to transfer the stock to or into the name of a new committee or into Court or otherwise, and also to receive and pay over the dividends thereof in such manner as the Judge directs."

Section 137: "Where a person is appointed to make or join in making a transfer of stock, such person shall be some proper officer of the Bank, or the company or society whose stock is to be transferred."

Section 146: "All transfers and payments made in pursuance of this Act under an order or a master's certificate, shall be valid and binding on

all persons."

Section 333: "This Act, and every order purporting to be made under this Act, shall be a full indemnity and discharge to the Bank and every other company and society and their respective officers and servants, and all other persons respectively, for all acts and things done or permitted to be done pursuant thereto, or pursuant to the rules under this Act, so far as relates to any property in which a lunatic is interested either in his own right, or as trustee or mortgagee, and it shall not be necessary to inquire into the propriety of any order purporting to be made under this Act relating to any such property or the jurisdiction to make the same."

The Lunacy Act, 1891 (54 & 55 Vict. c. 65) provides by section 27, sub-s. 4, that "the provisions of section 116, subs. 2, of the principal Act shall apply to the persons named in subs. 1 (d) of the same section, though not lunatics."

officer of the Bank. The section in effect gives power to appoint an attorney to receive dividends while a person is in the state of the lady in question.]

The section is not applicable at all.

[DAVEY, L.J.: I will not read subsection 2 of section 116 into subsection 1. They must be read side by side. Subsection 2 was to explain section 120.]

The indemnity clause is in a different part of the Act, viz., Part XII.

[LINDLEY, L.J.: Surely that applies to any order made under the Act?]

No; it refers only to lunatics.

[LINDLEY, L.J.: The point whether the provisions of the Acts relating to "management and administration" are confined to sections 116—120, or extend to any sections which are really administrative, arose on the question of the jurisdiction of Masters.]

Then perhaps your lordships will hold that section 333 applies so as to protect the Bank?

[LINDLEY, L.J.: Then you say that these stocks ought to have been transferred?]

I doubt if that would protect the Bank. It might be necessary to sell the stock and use the powers of the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 35. In order to enable a person to receive dividends, the vesting order clauses must be resorted to: *In re Noyce* (2). Where there are special powers you must not go to the general powers. The vesting order clauses, however, only apply to lunatics; further, this order is not made upon a petition which is necessary to obtain a vesting order: Lunacy Orders, 1892, r. 17.

[DAVEY, L.J.: Section 120 is not exhaustive.]

In re Peyton's Settlement (3) shows that the Trustee Acts apply to future as well as past dividends.

(2) [1892] 1 Q. B. 642; 61 L. J. Q. B. 628; 66 L. T. 331; 40 W. R. 371.

(3) 25 Beav. 317; 2 De G. & J. 290; 27 L. J. Ch. 476; 6 W. R. 429, 433.

Swinfen Eady, Q.C., and Sebastian, for Miss M. A. Browne :

One question in this case is whether subsection 1 of section 116 is independent of subsection 2. The construction of the Bank gives no effect to the words "any specified act" in subsection 2.

[LOPES, L.J.: Is not a person such as the lady whose case is under consideration a statutory lunatic, and within the definition of lunatic?]

If the argument on the other side is right, the Court could have no authority to give power to do ordinary every day acts. There are two classes of acts to be done by committees: (i.) Small acts where it is not necessary to go to the Judge; and (ii.) Larger acts in respect of which the order of the Judge is necessary. Section 120 is confined to the second class of acts, and says nothing about small powers. We rely on section 108, subsections 2 and 3. Suppose these were rents instead of dividends. If the bank are right in their contention, no order could be made to receive a lunatic's rents. This section covers the special powers, and also extends to general powers. The effect of the Act is that although persons are not in fact lunatics, they are lunatics within section 116. In the Lunacy Act, 1889 (52 & 53 Vict. c. 41) s. 52, subs. 1, corresponds with section 116, subsection 2 of the Consolidation Act of 1890.

[DAVEY, L.J.: I do not understand how in the case of an owner of real estate rents could be got in.]

The committee has authority to receive them.

[LINDLEY, L.J.: An ordinary receiver does so.]

Orders for the payment of dividend only were made in *In re Stark* (4), *In re Elias* (5), *In re Morgan* (6).

[LINDLEY, L.J.: It is only a question of machinery.]

Yes; but we want to save expense. The Lunacy Act, 1890, would not be unworkable; for section 146 would sufficiently protect the bank.

(4) 2 Mac. & G. 174.

(5) 3 Mac. & G. 234.

(6) 1 Hall. & Tw. 212

Latham, Q.C., in reply :

The cases referred to dealt only with past dividends. Section 108 of the Act of 1890 is a management and administration section, and therefore applies to subsection 1 (d) of section 116. A committee might be appointed, and the difficulty would disappear.

[LINDLEY, L.J. : Why should not this person be regarded as a receiver appointed under section 116, subsection 2 ?]

“ Specific act ” can only mean in connexion with powers.

[LINDLEY, L.J. : Then under clause 108, section 2 ? In substance she is a receiver, why should she not have the powers ?]

If this order is made under the vesting order clauses, it ought to have been made on petition.

Cur. adv. vult.

August 6.

LINDLEY, L.J. : [after stating how the question arose and reading the master's order, continued :] The first objection taken was to the title of the order. But the order is in the form given in the schedule to the Rules in Lunacy, 1892, and those forms were carefully settled. In cases of this description it is not thought desirable to head the forms of orders “ In Lunacy,” so as to publish more than is necessary the fact that the person named in the title is in the unfortunate condition in which that person really is. This objection is untenable, and very properly was not seriously insisted on. The next objection was that there was no jurisdiction to make the order. This is, of course, an important matter. The general jurisdiction of a Judge in lunacy is conferred by section 108 of the Lunacy Act, 1890, and extends, *inter alia*, to the management of the estates of lunatics, and by section 341 “lunatic” includes a person of unsound mind. The general jurisdiction of masters is conferred by section 111, and by Rule 10 of the Rules in Lunacy of 1892. The Act is divided into parts. Part IV. is headed thus : “ Judicial powers over person and estate of lunatics,” and is subdivided into groups of sections. One group, commencing with section 116 and ending with section 130, is headed “ Management and Administration.” This group of sections, it will be observed, applies (i.) to lunatics so found by inquisition ; (ii.) to lunatics not

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so found ; and (iii.) to persons who are, through mental infirmity arising from disease or age, incapable of managing their affairs. Such persons may be lunatics in the common acceptation of the term or they may not ; they are on the border line. But, even if they are not insane enough to be found lunatics by inquisition, they may for many purposes be treated as lunatics, though not so found by inquisition. This is plain from the language of section 116 of the Lunacy Act, 1890, and section 27, subsection 4 of the Lunacy Act, 1891, and of Rule 56 of the Rules in Lunacy, 1892. The power of a Judge in lunacy to appoint a receiver of the property of a person subject to his jurisdiction under the Act is conferred generally by sections 108 and 116 of the Lunacy Act, 1890, and Rule 83 of the Rules in Lunacy, 1892. Rule 83 expressly says : “ A receiver may be appointed in every case in which such appointment shall be deemed expedient.” Certain specific powers are authorized to be conferred on committees by section 117 and subsequent sections of the Lunacy Act, 1890, and section 120, which does not mention the appointment of a receiver, does not, by implication or otherwise, negative the power of the Judge to appoint a receiver under the general authority to which I have alluded. The power to appoint a receiver is clearly a power relating to “ management and administration,” and although not specially mentioned in the group of sections so headed, is within the general words with which section 116 commences. This being so, the power may be exercised by a master, and it need not be exercised by a Judge in person. Soon after the Rules in Lunacy, 1892, had been made, a question arose whether a master had jurisdiction to make a vesting order under section 133 *et seq.* of the Lunacy Act, 1890, and, after carefully examining the Acts and rules, all the members of the Court of Appeal came to the conclusion that he could, and such orders have ever since been made accordingly. Section 133 and Rule 54 authorize orders for transfer into Court and vesting orders in cases to which section 116 applies. The jurisdiction to make the order being clear, it is also clear that the Bank of England may safely act upon it. Section 146 is enough to protect the bank. Section 333 is still more explicit, and although the expression there is “ so far as relates to any property in which

a lunatic is interested," that expression clearly, in my judgment, includes all persons who, whether lunatic or not, are subject to the jurisdiction conferred on the Judges in lunacy, and can be treated as if they were lunatics under section 116 of the Lunacy Act, 1890. The practice of appointing a receiver of the dividends of government and other securities without ordering a transfer of them into the name of the receiver is not, however, usual in chancery, nor has it been usual in lunacy. The practice has been to order the stock, &c., to be transferred into Court, and then to let the receiver obtain the dividends from the paymaster-general. A settled practice like this ought not to be departed from without sufficient reason, and, in general, it ought to be adhered to. Nor is there any reason for not adhering to it in this case. The order, therefore, will be remitted to the master for alteration accordingly. I have no doubt, however, of the jurisdiction of the master to make an order in the form adopted in this case, nor of the safety of the bank in acting upon it; and if hereafter, an order in this form should be deliberately made for any special reason, the bank ought to act upon it and to pay the dividends to the receiver, treating him as an agent duly appointed to receive dividends only. In cases of shares, &c., in companies, a transfer into Court might be inexpedient, if not impossible, and yet a receiver of the dividends might be highly desirable.

LOPES, L.J. : There are three classes of persons mentioned in section 116 : (i.) lunatics so found by inquisition ; (ii.) lunatics not so found ; (iii.) persons who, through mental infirmity arising from disease or age, are incapable of managing their affairs. Having regard to the language of section 116 of the Lunacy Act, 1890, and section 27, subsection 4 of the Lunacy Amendment Act, 1891, and of Rule 56 of the Rules in Lunacy of 1892, I am of opinion that it was the intention of the Legislature that the last-mentioned class, for the purposes of management and administration, were to be, in all respects, regarded and treated as lunatics. If this is correct, all difficulty is removed, and the same power and the same jurisdiction in respect of management and jurisdiction exist in respect of the last class as exist in the case of two former classes of persons, and the bank is indemnified under sections 146 and 333. In my judgment, there is jurisdiction to

(LOPES, L.J.)

appoint a receiver of the dividends alone, and in some cases that would be the proper course to adopt ; but in this particular case I see no reason to depart from that which appears to have been the usual practice. The objection to the title of the order cannot be supported. The title is in accordance with the form given in the schedule to the Rules in Lunacy of 1892.

DAVEY, L.J.: The question in this case is whether the Bank of England is bound to act upon an order of Master BULWER appointing a receiver of the dividends of certain stocks standing in the name of Miss Browne in the books of the bank. *Mr. Latham* first objected to the title of the order ; but it appears to be in the form provided for such cases as the present in the rules, and, therefore, no objection can be made to it. [His Lordship read section 116, subsection 1 of the Lunacy Act, 1890, and continued :] *Mr. Latham* contended that the "powers and provisions" so made applicable are only those which are found in the group of sections under the heading "management and administration." In my opinion this is wrong ; I think the Act means what it says, and that all powers and provisions relating to "management and administration" which are found in Part IV. of the Act are included. Section 108, subsection 2, enabled the Judge in Lunacy to make orders for the custody of lunatics so found by inquisition and the management of their estates. By Rule 83, made in pursuance of the Act, "A receiver may be appointed in any case in which such appointment shall be deemed expedient." I agree that, if there was jurisdiction to make the order impeached, it might be made by the master ; and I am of opinion that, by the joint effect of section 108, subsection 2, Rule 83, and section 116, subsection 1 (d), the order for a receiver in the present case could be made, and I also think that the Court could make a vesting order under section 133. *Mr. Latham* may be right, and I rather think he is right, in construing section 116, subsection 2, with reference to section 120, as enabling the Judge to confer, in a case like the present, all or any of the powers in section 120 on a person to be named ; but I think he is wrong in treating section 120 as exclusive. As I have already said,

I think the Judge may make orders for the management of the estate of the *quasi* lunatic generally, and I think that section 116, subsection 2 is not a limiting section, but is inserted, *ex majori cautelâ*, to enable the Judge to confer the additional or special powers enumerated in section 120. But, says *Mr. Latham*, the bank will not be indemnified in acting on the order, because section 333 confines the indemnity to any acts "so far as relates to any property in which a lunatic is interested," and the person in question in this case is not a lunatic, and he refers to section 27, subsection 4 of the amending Act of 1891. In my opinion, the bank will be amply protected by section 146, but I also think that section 333 applies to the case, and a person within the description in section 116, subsection 1 (d), is a lunatic for the purposes of that section. Lastly, it was said that the order was wrong in appointing a receiver of the dividends only of stocks standing in the books of the Bank of England in the name of the person whose property the Court has taken under protection. No statutory provision relating to the bank which prohibits or prevents such an order being made was brought to our attention, and I am of opinion that the Court has jurisdiction, and I think it important that we should not allow any doubt to be entertained as to our jurisdiction to appoint a receiver of dividends only. There may be many cases in which it would be highly desirable to adopt that course. The receiver is but the statutory or judicial agent, or attorney, to receive dividends due to the person in whose name the stocks are standing. But, as it appears to be unusual to appoint a receiver of dividends of stocks in the books of the Bank of England, and there is no sufficient reason in the present case why the stocks should not be brought into Court, it will, perhaps, be better to follow the usual practice, and direct the stocks to be transferred into the name of the paymaster-general.

The order was remitted to the master for amendment, so as to concur with the usual practice by making the order an order for bringing the stocks into Court which were under the management of the Bank of England.

No order as to costs.

Solicitors: *Freshfields & Williams*, for the Bank of England.

Kingsford, Dorman & Co., for Miss M. A. Browne.

IN RE PARKER, MORGAN v. HILL.

1894, August 2. LINDLEY, LOPES AND DAVEY, L.JJ.

Principal and Surety—Payment by one Co-surety—Right of Proof against other Co-sureties—Merchant Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 5.

Where one of several co-sureties has paid off the debt, he is, notwithstanding the terms of section 5 of the Merchant Law Amendment Act, 1856, entitled to the benefit of a proof by the creditor against one of the co-sureties for the full amount of the debt, and his right of proof is not (though his right of receiving dividends is) limited to the sum which as between him and his co-surety such co-surety is liable to pay.

Ex parte Stokes (1) followed.

Per DAVEY, L.J.: Whether the result would be the same if the creditor had never proved, and the surety who had paid the debt had in the first instance claimed against his co-surety, *quere*.

APPEAL from Kekewich, J.

By a mortgage deed dated 12 March, 1892, James Caley Parker, Robert Holmes, Luther Tall, George Yallup, and Richard Harry Court jointly and severally covenanted, as sureties for the Norwich and Norfolk Investment Corporation, to repay to the mortgagees a sum of 1,000*l*.

Subsequently Holmes and Tall became bankrupt. On 18 February, 1893, Parker executed a deed assigning all his real and personal estate to the defendant as trustee for his creditors. The mortgagees sent in a claim to the trustee for a sum of 1,753*l*. for principal money, interest and costs due in respect of the whole amount of the mortgage debt. The claim was not disputed, though the exact amount was never adjusted, but nothing was paid to the mortgagees.

Court was afterwards called upon to pay, and paid, the whole mortgage debt, Yallup repaying to him half the sum he had so paid. At the same time the mortgagees assigned to the plaintiffs, as trustees for Court and Yallup, the debt and the securities therefor, together with the benefit of all claims or proofs against the estate of Parker.

Parker's estate being insolvent, the plaintiffs claimed to be

entitled to a dividend upon the whole amount of the claim made by the mortgagees, if such dividend did not (as it was agreed it would not) exceed one-third of the whole debt, the amount which, as between it and the plaintiffs' *cestuis que trustent*, Parker's estate was liable to pay. The defendant contended that the plaintiffs could prove for and take a dividend upon only one-third of the debt.

On 16 June, 1894, KEKEWICH, J. gave judgment for the plaintiffs. The defendant appealed.

T. B. Napier, for the appellant :

This case turns upon section 5 of the Mercantile Law Amendment Act, 1856, which says that no surety shall "recover" from a co-surety more than the just proportion of the debt to which the co-surety is liable. That means that he cannot sue or prove for more.

[*Hadley*, for the respondent, referred to *In re M'Myn, Lightbown v. M'Myn* (2)].

The only case against me, *Ex parte Stokes* (1), was wrongly decided. It is inconsistent with the principle of the other cases: *Ex parte Snowden* (3), *Wolmershausen v. Gullick* (4), *In re Ennis, Coles v. Peyton* (5).

The effect of KEKEWICH, J.'s decision is that a man gets less because he has recovered judgment.

[DAVEY, L.J.: In Lord Eldon's time the practice seems to have been to convert the creditor into a trustee of the dividends for the surety who had paid him. He would, of course, continue to receive dividends till the whole debt was paid.]

This case should not be decided by the law applicable to bankruptcy.

(2) 33 Ch. D. 575; 55 L. J. Ch. 845; 55 L. T. 834; 35 W. R. 179.

(3) 17 Ch. D. 44; 50 L. J. Ch. 540; 44 L. T. 830; 29 W. R. 654.

(4) 3 R. 610; [1893] 2 Ch. 514; 62 L. J. Ch. 773; 68 L. T. 753.

(5) 7 R. 544; [1893] 3 Ch. 238; 62 L. J. Ch. 991; 69 L. T. 738.

[DAVEY, L.J., referred to *Ex parte Rushforth* (6), *Wright v. Morley* (7), and *Watkins v. Flannagan* (8).]

Hadley, for the respondent :

I admit that there is no authority exactly in point more recent than *Ex parte Stokes* (1). [He was then stopped.]

LINDLEY, L.J. : This is an appeal from a decision of Mr. Justice Kekewich, and raises a question which, if it were new and not covered by authority running back to 1848, I should have thought quite worthy of consideration. But in my view if we were to allow this appeal we should be departing from the recognised rule in matters of this description. There were five parties who became sureties for a debt. Two of them became insolvent long ago, and two of the others have paid the whole debt, and seek to obtain from the third his proportion of the whole. By no hocus-pocus can they get more than one-third from him. [The Lord Justice stated the other facts, and continued :] Now comes the question, what are the rights of the two sureties who have paid the debt as against the estate which is being administered under the provisions of this deed ? They say, " We are entitled to the benefit of the proof of the principal creditor." They admit that they are not entitled to get more than one-third of the whole claim out of the estate. The question turns mainly on section 5 of the Mercantile Law Amendment Act, 1856, which, except in one or two respects, is a re-enactment of the old state of the law. It sets right the old doctrine that when a surety paid a debt the debt was gone. It runs thus : [The Lord Justice read the section, and continued :] If the matter were *res nova* I should have thought it would have been more consonant with justice to hold that as this surety could not " recover " more than a third, his right of proof would also be limited to a third. But when we look to see how the rights in such a case are worked out, and have been worked out ever since 1848, we find that a different rule has been adopted. The question was settled by Vice-Chancellor KNIGHT-BRUCE in 1848 in the case of *Ex parte Stokes* (1). You prove for the whole debt, but you do not recover more than your proper

(6) 10 Ves. 409; 8 R. R. 10.

(7) 11 Ves. 12; 8 R. R. 69.

(8) 3 Russ. 421.

proportion. That is precisely the order which Mr. Justice KEKEWICH has made here, and I do not feel at liberty to depart from the rule established in *Ex parte Stokes* (1). I regard the rule as too well settled to be now disturbed.

LOPES, L.J.: I am of the same opinion. I think the decision of Mr. Justice KEKEWICH was right, and in point of fact that, as Lord Justice LINDLEY has said, the question is covered by authority.

DAVEY, L.J.: I am of the same opinion. It has been laid down more than once that where a creditor is entitled to demand payment of a debt from each of several persons, and no part of the advance has been paid, he may prove against each of them, and the circumstance that one of them is the principal debtor and the other a surety does not give a right to stop him receiving dividends until he has been paid 20s. in the pound. The right was to make a demand upon the sureties for the full amount of the debt. One of the sureties, after that claim is made, pays off the creditor, and he is entitled then to all the rights and remedies which that creditor possessed for the recovery of his debt, including this proof which had been made under this deed. He is entitled to the benefit of that, but only to the extent of recouping himself the proper proportion of the debt. That is the order which has been made by Mr. Justice KEKEWICH. It is in entire accordance with the later practice in bankruptcy, and seem to me to be the logical result of working out the Mercantile Law Amendment Act. What would have been the effect if no claim had been made under the creditors' deed by this creditor, and the surety had in the first instance claimed against his co-surety, I express no opinion. I think it quite possible the rights would have been different; but here a claim was made by the creditor, and the surety is entitled to the benefit of that right as well as of every other right which the creditor had for the recovery of his debt.

Appeal dismissed.

Solicitors: *Oldman, Clabburn & Co.*, for *D. Havers*, Norwich, for the Appellant.

Sharpe, Parker, Pritchards & Barham, for the Respondent.

CADOGAN v. LYRIC THEATRE.

1894, July 18. LORD HERSCHELL, L.C., & LINDLEY & DAVEY, L.JJ.

Equitable Execution—Receiver—Rents and Profits of Land—Earnings of Business
—R. S. C. 1883, Order L., r. 15A.

Although a judgment creditor is entitled to have a receiver appointed, by way of equitable execution, of land in which the judgment debtor has only an equitable interest, he is not entitled to take through such receiver the earnings of a business carried on by the judgment debtor upon the land.

APPEAL from Kekewich, J.

The plaintiff was a creditor of the defendant company for the sum of 2,000*l.*, and on 1 June, 1894, obtained judgment against them for that sum. The defendant company had mortgaged the lease of their theatre to another creditor. The plaintiff moved before KEKEWICH, J., for the appointment, by way of equitable execution, of a receiver of rents due or becoming due to, and profits earned by, the defendant company. There was evidence that considerable profits were being derived by the defendant company from a performance they were carrying on at their theatre, but that there were no "rents," in the strict sense, for the receiver to receive. On 12 July, 1894, KEKEWICH, J., appointed a receiver in accordance with the notice of motion, being of opinion that money paid for admission to the theatre came within the description of "rents and profits" thereof. The defendant company appealed.

Ingpen, for the appellants :

The order appealed against is not warranted by Rules of the Supreme Court, Order L. r. 15A, under which it purports to be made.

[DAVEY, L.J., referred to *Harris v. Beauchamp* (1).]

There is no jurisdiction to make such an order, because the theatre is not producing any "rents;" and even if there is jurisdiction it is not "just and convenient" to make the order.

[He cited *Holmes v. Millage* (2).]

(1) 9 B. 653; [1894] 1 Q. B. 801; 63 L. J. Q. B. 480; 70 L. T. 636, 42 W. R. 451.

(2) 4 B. 332, 334; [1893] 1 Q. B. 551; 63 L. J. Q. B. 380; 68 L. T. 205; 41 W. R. 354.

Grosvenor Woods, Q.C., and Cecil Chapman (Graham Hastings, Q.C., with them), for the respondent :

You can get equitable execution in every case where, but for some obstacle which a Court of equity can remove, you would have been entitled to legal execution: per BOWEN, L.J., in *In re Shephard, Atkins v. Shephard* (3). If the order of KEKEWICH, J., is wrong, we ask for what we are certainly entitled to, a receiver of the equity of redemption in the mortgaged premises and of the company's earnings. The facts in *Holmes v. Millage* (2) were totally different.

[LORD HERSCHELL, L.C. : The reasoning there does not depend on its being a case of future personal earnings. The reasoning in *Holmes v. Millage* (2) and *Harris v. Beauchamp* (1) seems to me to cover this case.]

The earnings are incident to the ownership or proprietorship of the theatre, and none the less that the proprietors represent that there will be some entertainment given in it.

[DAVEY, L.J. : If you could show that such earnings could in any case be taken under an *elegit* you would go a long way to make out your case ; but I am not satisfied of that.]

Subject to prior incumbrances we are entitled to the theatre, and this is our only way of enforcing our security.

Ingpen, in reply :

There is really nothing for the receiver to receive.

[LORD HERSCHELL, L.C. : If you are right the debtor is in a better position because he has mortgaged, which seems a strange result. To "receive" does not necessarily mean to receive money ; the receiver might receive something the fruits of which will be money.]

At any rate, it is not "just and convenient" to make an order the practical effect of which would be simply to make it impossible for the company to carry on its business.

(3) 43 Ch. D. 131 ; 59 L. J. Ch. 83 ; 62 L. T. 337 ; 38 W. R. 133.

[Lord HERSCHELL, L.C., referred to Kerr on Receivers (3rd edit. p. 45) and *Rhodes v. Mostyn* (Lord) (4), there cited.

LINDLEY, L.J.: I think there is a form in Seton fashioned on that case.]

The appointment of a receiver is not delivery in execution, and the receiver could not let the property except under the Conveyancing Act, 1881.

[DAVEY, L.J.: When the receiver takes possession that is delivery in execution. The Conveyancing Act gives no new powers, but merely implies the powers which, before, it was usual to insert in mortgages.

Lord HERSCHELL, L.C., referred to *Ex parte Evans, In re Watkins* (5).

DAVEY, L.J., referred to the judgment of MELLISH, L.J., in *Hatton v. Haywood* (6).]

[*Grosvenor Woods, Q.C.*, referred to the judgment of COTTON, L.J., in *Salt v. Cooper* (7), and to *In re Pope* (8).]

Lord HERSCHELL, L.C.: In this case the respondent, having a judgment against the appellants for a sum of 2,000*l.*, and not being able through the sheriff to obtain satisfaction of his judgment by means of execution, applied to Mr. Justice KEKEWICH for, and obtained, an order for a receiver of the rents and profits of the defendant company by way of equitable execution, the contention being that, the defendant company carrying on business as theatre managers at their theatre, the execution creditor was entitled to have a receiver appointed who should take the moneys paid for admission to the theatre, and so obtain satisfaction of his judgment. I do not myself think, with deference to the learned Judge, that that was a right order.

The execution creditor can only come to a Court of equity to

(4) 17 Jur. 1007.

(5) 13 Ch. D. 252; 48 L. J. Ba. 97; 41 L. T. 565; 28 W. R. 127.

(6) L. R. 9 Ch. 229; 43 L. J. Ch. 372; 30 L. T. 279; 22 W. R. 356.

(7) 16 Ch. D. 544; 50 L. J. Ch. 529; 43 L. T. 682; 29 W. R. 553.

(8) 17 Q. B. D. 743; 55 L. J. Q. B. 522; 55 L. T. 369; 34 W. R. 693.

enforce his judgment against property not capable of being reached by a common law process. Where there was some equitable interest which could not be reached at law, and which the Court of equity could reach, in that case he was entitled to come to a Court of equity to enable him to reach the property which he could not reach at law. But it was argued on behalf of the respondent that the money paid by persons who went to the theatre for the purpose of witnessing the spectacle there was really rents of the land owned by the defendants, and therefore that the order was a proper one, and that the case was on that point distinguishable from the cases of *Holmes v. Millage* (2) and *Hatton v. Haywood* (6), which otherwise he admitted to be in point. But it seems to me that those who go to the theatre do not pay for the use of part of the premises, although, no doubt, premises are requisite for carrying on the business of a spectacle-giver, just as they are requisite for the business operations of a person carrying on any other business. I do not think, therefore, that the distinction taken can be supported.

Still, it appears to me that the execution creditor properly comes to this Court for relief. If the property were not mortgaged, then it is quite plain he could sue out a writ of *elegit* and get execution of the property of the debtor. The property being mortgaged, the execution debtors have only an equitable interest, and therefore an *elegit* is excluded from the remedies of the execution creditor. But the debtors still retain an equitable interest, and the case appears to me to be within the words used by Lord Justice LINDLEY in *Holmes v. Millage* (2) as to the cases in which Courts of equity interfere: "The only cases of this kind in which the Courts of equity ever interfered were cases in which the judgment debtor had an equitable interest in property which could have been reached at law if he had had the legal interest in it instead of an equitable interest only." There is no doubt that, if the debtor had still the legal estate, the judgment creditor could issue an *elegit*, and therefore, there being only an equitable estate, he must come to a Court of equity, and it appears to me that he is entitled to the equitable execution which is the substitute for an *elegit*, the legal execution. It is not necessary to refer to more than one case, *Ex parte Evans*, *In re Watkins* (5), because the principal prior authorities are there alluded to by Lord Justice JAMES. He says: "Beyond all question

(Lord HERSHELL, L.C.)

it was held in *Hatton v. Haywood* (6) and *Anglo-Italian Bank v. Davies* (9), that an order appointing a receiver amounted to equitable execution. A judgment creditor, not being able to obtain relief at law under the old system, because his debtor had nothing but an equitable interest in the land, came into a Court of equity to obtain that relief which he could not obtain at law, and the moment he established the difficulty in his way at law, and the Court made the order giving the right to the possession of the land to the receiver appointed on his behalf, that order . . . was as much a delivery in execution of land in which the debtor had only an equitable interest as was the sheriff's return to the writ of *elegit* at law . . . a delivery in execution of land in which the debtor had a legal interest." That seems to me to point clearly to what is the principle there, and also in this case. There being only this equitable estate, there should be precisely the same execution in equity as there would have been at law if the legal estate had been retained by the debtor. I think therefore there should be an order for a receiver of the land of the defendant company by way of equitable execution, that order being without prejudice to the rights of prior incumbrancers.

LINDLEY, L.J. : I think that in substance the order appealed from is right, and that the ordinary principles which govern Courts of equity, and have done so for years, apply to this case. In form I think the order is wrong. The applicant, the plaintiff, is a judgment creditor. His judgment debtor is entitled to some land. Supposing there were no incumbrancers, what would be the right of the judgment creditor? It would be to take possession of that land under an *elegit*. He would have a legal right to turn the debtor out and make what he could of the land. That would be his right at law if it were not for the difficulties caused by the debtor having mortgaged his interest. That is precisely the case where, long before the Judicature Act, relief was obtained in equity, without prejudice of course to the rights of the incumbrancers. There are cases in plenty where that has been done : such cases as *Rhodes v. Mostyn* (Lord) (4), decided by Vice-Chancellor Wood

in 1853. Why should not a similar order be made now? I cannot conceive any reason. This case is distinguishable from *Harris v. Beauchamp* (1) and *Holmes v. Millage* (2). The judgment debtor should be directed to deliver possession to the receiver. The whole order must be without prejudice to the rights of the mortgagees.

DAVEY, L.J.: I agree that the order in the form in which it was made by Mr. Justice KEKEWICH is wrong, and I think the substance of that order is wrong, because it is clear that the learned Judge intended to appoint a receiver who would be entitled to sit in the box office of the theatre and receive the sums paid for stalls and boxes and so forth. I do not think that was right. I do not think the receiver is entitled to carry on the company's business, or to receive the profits of carrying on that business, though he may be entitled to prevent other persons, including the company itself, from carrying on that or any other business on the company's premises. The order of the learned Judge would give him the right to take the profits of carrying on the company's business. I do not think that we ought to make such an order. Ever since *Neate v. Marlborough (Duke)* (10), and indeed before that case, it has been held that where there is a legal impediment to the judgment creditor taking the lands of the judgment debtor by *elegit*, he is entitled to come into a Court of equity and have the same benefit which he would have had at law if no legal impediment had existed, that is to say, where the estate is equitable the Court gives the creditor as nearly as possible the same relief as he would have got through the sheriff if the estate had been legal. That seems to me not only to be good law warranted by the authorities, but to work out logically the principle upon which this jurisdiction is and ought to be exercised. That being so, I think that we ought to make an order in the terms which the Lord Chancellor has mentioned. The vice of this order is that it gives power to receive the profits of the defendant company, which might be profits derived from carrying on a business anywhere else, so far as the terms are concerned. It ought to be limited to profits derived from the lands, and as it appears that the whole of the lands are in the possession and occupation of the defendant company, and are being used by them,

(10) 3 My. & Cr. 407.

(DAVEY, L.J.)

I think it is right, in order to avoid question hereafter, to vary the order so as to direct the company to deliver possession to the receiver. Of course the order will be without prejudice to the rights of prior incumbrancers.

Order varied.

Solicitors : *M. S. Rubinstein*, for the Appellant Company.

Lee & Pembertons, for the Respondent.

LESLIE v. ROTHES (EARL).

1894, May 8. LINDLEY, LOPES AND KAY, L.JJ.

Will — Construction — Words of Gift and Shifting Clause — “ Possession or Receipt of Rents and Profits.”

The canon of construction laid down in *Doe d. Hearle v. Hicks* (1) and *Langdale v. Briggs* (2), that an estate clearly given cannot be divested except by words as clear and unequivocal as those which created it, approved and applied.

A testatrix by her will directed that certain hereditaments thereby devised should go over in case the person for the time being “ entitled to the possession or to the receipt of the rents and profits ” of the said hereditaments should succeed to a certain title. A management clause provided that while and so often as the person who (but for the proviso) would have been “ entitled to the possession, receipt, or enjoyment of the rents, issues, and profits ” of the hereditaments should be an infant, the trustees should enter into and hold “ the possession or receipt of the rents, issues, and profits ” thereof, and manage the same. The trustees had a power of leasing during the minority of any person who if of full age would have been “ entitled at law or in equity to the possession or to the receipt of the rents and profits ” of the hereditaments :—

Held, on the construction of the whole will (several other parts of which also contained the words “ possession or receipt of rents and profits,” or similar words), that the shifting clause did not apply to the case of a tenant in tail in possession who while an infant succeeded to the title.

APPEAL from Kekewich, J.

Lady Jane Elizabeth Wathen by her will dated 29 July, 1859, devised certain freehold hereditaments at Dorking to the use of Martin Leslie Haworth, the eldest son of her niece Mary Elizabeth

(1) 8 Bing. 475.

(2) 8 De G. M. & G. 391, 429; 25 L. J. Ch. 100; 4 W. R. 703.

Haworth, during his life, with remainder to his first and other sons successively in tail, with remainders over for life and in tail, with remainder to the trustees "upon trust to permit the rents, issues, and profits of the said hereditaments to be received and taken from time to time by the person who, if the said Mary Elizabeth Haworth were dead, would for the time being be entitled to the possession or receipt of the same rents, issues, and profits under the limitations hereinafter contained;" with remainders over, with remainder to the trustees upon a like trust for the person who if the testatrix's niece, Anna Maria Courtenay, were dead, "would for the time being be entitled to the possession or receipt of the same rents, issues, and profits under the limitations hereinafter contained." There was a proviso that every male person who under the will should become beneficially entitled to the possession or to the receipt of the rents and profits of the said hereditaments should within a year, or if he were under age within a year of attaining full age, take upon himself, and use upon all occasions, the surname of Leslie and no other surname, and also take, use, and bear the arms of Leslie and no other arms; or if he were a peer the surname of Leslie together with his title, and the arms of Leslie quartered with his armorial bearings. In case of default the limitations in favour of the person making default were to become void, and the hereditaments were to devolve on the person next in remainder. It was provided that during such time as Martin Leslie Haworth should be under the age of twenty-five, or as any person who under the will would for the time being, if this proviso had not been inserted, have been entitled to the possession, receipt, or enjoyment of the rents, issues, and profits of the said hereditaments as tenant for life or as tenant in tail by purchase, should be under twenty-one, the trustees of the will should enter into the possession or receipt of the said rents, issues, and profits, and should during such time or minority hold such possession or receipt, and manage or superintend the management of the hereditaments, with wide powers specified in the will. Subject to payment of the expenses of management and other outgoings, the trustees were to pay such sum as they should think fit for or towards the maintenance or education of Martin Leslie Haworth or of such minor as aforesaid (either

directly or to his guardian or guardians), and to stand possessed of the residue upon the trusts thereafter declared of the capital of her residuary personal estate. Tenants for life beneficially entitled, or the trustees during the minority of any person who if of full age would have been entitled at law or in equity to the possession or to the receipt of the rents and profits of the hereditaments, were empowered to let all or any of the hereditaments for twenty-one years. By a shifting clause it was provided "that if any person for the time being entitled to the possession or to the receipt of the rents and profits of the said hereditaments and premises hereinbefore devised shall succeed to the title or dignity of Earl or Countess of Rothes, then and in such case and immediately thereupon, and so often as the same shall happen, the said hereditaments and premises shall go and remain to the uses, upon and for the trusts, and with, under and subject to the powers, provisoes and declarations, to, upon, for, with, under, and subject to which the same premises would have stood limited and settled under and by virtue of this my will if the person who shall so succeed to the said title and dignity were dead without issue." Certain jewels and other articles were given to the trustees upon trust to permit them to go along with the hereditaments and be used and enjoyed therewith as long as the rules of law and equity would permit by the person or persons entitled at law or in equity to the possession or the receipt of the rents and profits. The residuary personal estate was bequeathed to the trustees upon trust to convert the same into money and to make certain payments thereout and to invest the ultimate residue with the consent of the person for the time being entitled to the possession or the receipt of the rents and profits of the hereditaments, or if he should be under age at the discretion of the trustees, in real estate, which was to go as far as might be on the same trusts as the said hereditaments.

The testatrix died on 19 January, 1861. Martin Leslie Haworth attained twenty-five in 1864 and thereupon went into possession of the hereditaments. Within the year limited by the will he obtained a license from the Crown to take and use, and did take and use, the name and arms of Leslie. During his life the hereditaments were sold under the Settled Estates Act, 1877, and the proceeds were invested in consols in the

names of the trustees. He died in 1882, leaving an only son, the defendant the Earl of Rothes (then Norman Evelyn Leslie Leslie), who was born in 1877. After the death of Martin Leslie Haworth the trustees paid the income of the trust fund to the guardians of the infant defendant for his maintenance and education. On 19 September, 1893, the infant succeeded to the Earldom of Rothes in the peerage of Scotland.

The plaintiff was the fifth son of Mary Elizabeth Haworth, and if the infant Earl had been dead without issue would have been entitled under the will to an estate for life in the hereditaments or in the trust fund which represented them and in the residuary personal estate. He contended that in the events which had happened the shifting clause had come into operation, and that accordingly his life interest had become an estate in possession.

The facts were stated in a special case, and the opinion of the Court was asked for as to whether the plaintiff had become so entitled in possession. On 13 March, 1894, KEEWICH, J., decided that the infant defendant, when he succeeded to the Earldom, was not "entitled to the possession or to the receipt of the rents and profits" within the meaning of the shifting clause, and that therefore that clause had not come into operation. The plaintiff appealed.

Crackanthorpe, Q.C., and *B. B. Rogers*, for the appellants :

The case turns on the meaning of the words "entitled to the possession or to the receipt of the rents and profits." "Possession" may mean possession in title as well as actual possession. The former is the meaning here, for the intention clearly is that the estate should go over if the defendant became Earl of Rothes; in fact, that the Earl should not have the estates. We admit that in the management clause the word "possession" means perception and receipt; but in the shifting clause it has the other sense.

[They cited *Fazakerly v. Ford* (3).]

Cozens-Hardy, Q.C., and *Vernon R. Smith*, for the respondent the Earl of Rothes, cited *Langdale v. Briggs* (2).

E. Knowles Corrie, for the respondents the trustees of the will.

Crackanthorpe, Q.C., in reply :

“Peerage” in the name and arms clause does not include a Scotch peerage like the Earldom of Rothes.

LINDLEY, L.J.: I do not pretend to have mastered this will, but I think I see my way through it sufficiently to dispose of this appeal. It is the will of a lady who has certain real property, and devises it, in the events which have happened, to the present Earl of Rothes, who is tenant in tail in possession with remainder to the plaintiff, also in tail; and the question is whether under this will the estate, which is vested in the Earl of Rothes subject to a divesting clause, which I will read presently, is to vest in the next tenant in tail.

Now, in order to understand that, one must look through the will and see what this lady was driving at, and get at her intention through the language which she has used. As the devise of the estate in the way I have mentioned there is a name and arms clause which runs thus: [the Lord Justice read the clause, and continued:] Well now, there the observation made by counsel for the appellant was right; she has thought there may be a person under age who may become beneficially entitled to the possession or to the receipt of the rents and profits of the hereditaments. With respect to the word “peer,” when I bear in mind that if he shall become a peer he is by the name and arms clause to take the surname of Leslie, and to quarter the arms of Leslie with his own, and when I bear in mind that Leslie is the family name of the family of Rothes, I doubt whether a peerage means the Earldom of Rothes. I consider the word “peer” as used to mean something besides or excluding the earldom.

Then we pass on and we come to the management clause. [The Lord Justice read the clause, and continued:] Pausing there, let us see what that means. What are these trustees to do? They are to enter into the possession or receipt of the rents, issues, and profits of the estate. What does that mean? It means that they are to take possession of such of the hereditaments as are unlet, and to receive the rents and profits of such as are let. They are to take possession, and to continue and hold such possession subject to the trusts for keeping up the property and for its management. They are not to stand possessed of the surplus in

trust for the owner of the property, but they are to capitalise it, and it is to be invested in the purchase of land. I ask myself this question, Whilst these trustees are in possession or receipt of the rents, issues, and profits, can anybody else be in possession or in the receipt of the same rents, issues, and profits of the same property? It is very difficult to say that he can.

Now I pass on. There is a leasing clause in which the same expression is used. Then we come to the shifting clause, and it is on the meaning of it that the whole of this case turns. [The Lord Justice read the clause, and continued:]

Now then we have to apply that to the facts of this case. What is the meaning of the expression "any person for the time being entitled to the possession or to the receipt of the rents and profits?" Counsel for the appellant asked us to read it in this way, "If any person for the time being entitled in possession to the property." But that is not what it says, and I do not think it means that. If that had been her meaning, the testatrix would not have employed the longer expression. Counsel for the appellant suggest that it means in possession as distinguished from reversion. But "entitled in possession" is not the expression. In speaking of freehold property we talk of estates in possession and in reversion, and in one sense the present earl is of course tenant in tail in possession. But that does not answer this language: he is not "entitled to the possession or to the receipt of the rents and profits" of this property. I do not quite see what this lady was driving at, but I think that the event upon which this property is given over has not happened. The appeal must be dismissed.

LOPES, L.J.: I am of the same opinion. The present Earl of Rothes is an infant seventeen years of age, and a tenant in tail by purchase of these estates, and in these circumstances we are asked to construe the shifting clause which Lord Justice LINDLEY has read. I must confess that, equally with Lord Justice LINDLEY, I am unable to see what the object of this clause is, or what the testatrix had in view. But I must look at the clause, and endeavour to construe it as best I can. The first question is, what is the meaning of the words "entitled to the possession or to the receipts of the rents and profits." It was contended by counsel for the appellant that "possession" is used in opposition to "reversion,"

(LOPES, L.J.)

but I cannot think that that is the correct view. In my opinion the sense is perfectly clear. "Possession" refers to the property which is unlet, "receipt of the rents and profits," to property which is let. That is the ordinary meaning, and to my mind it is the proper meaning in this clause. A case was cited which I think is very valuable as to the proper mode of interpreting a clause like this: *Langdale v. Briggs* (2). I will read a short passage from the judgment of Lord Justice TURNER in that case. He says: "The authorities, I think, warrant us in saying that these shifting clauses, if not to be construed strictly, are, at all events, not to receive such a construction as shall carry them beyond the purpose for which they were designed. The intention of the testator, to be ascertained from the language which he has used, and from the surrounding circumstances, so far as those circumstances can be regarded in proof of the intention, must govern the construction of shifting clauses as well as of other clauses of wills, but regard is also to be had to the rule that an estate, well created, is not to be taken away by doubtful or equivocal expressions."

It appears to me that the testatrix has herself put an interpretation on the words which she has used. I refer particularly to the management clause, because there we find a provision that the trustees shall enter into the possession or the receipt of the rents, issues, and profits. Then there is a provision for maintenance and education, and that subject to that the income is to be capitalised. It seems to me very difficult to say that the word "possession" in the shifting clause can have any reference to the possession of the infant earl, when in point of fact under the management clause the possession is not in him but in the trustees. I cannot myself see how the receipt of the rents and profits can be in two people at the same time. I therefore rely upon that as showing what is meant by the word "possession" in the shifting clause. When we come to the clause which immediately precedes the shifting clause itself, there are expressions more cogent still. "During the minority of any person who if of full age would be entitled at law or in equity to the possession or to the receipt of the rents and profits of the said hereditaments and premises;" thereby contemplating, as I read the words, that there might be an infant tenant who would not be entitled in law or equity to the possession

of the property or to the receipt of the rents and profits. Both these clauses seem to me strongly to show that the possession and receipt of the rents and profits are such as I have stated them to be.

According to my view, therefore, the earl was not in possession or in the receipt of the rents and profits. Even if I am inaccurate in that I am clear in this, that the expressions used are so equivocal as to bring the case within the authority I have read, by which it has been established that the words which destroy or shift a gift must be as strong and clear as those which create it.

KAY, L.J. : I also am of the same opinion. I think the only safe mode of dealing with a shifting clause like this is to say that anybody who seeks by it to claim the estate must show very clearly that he does come within the words of the clause. It is a paramount canon of construction that the words which divest an estate must be as clear as those which create it : *Doe d. Hearle v. Hicks* (1) ; *Langdale v. Briggs* (2). This clause most clearly does not divest the estate of any person who becomes Earl of Rothes unless that person is for the time being entitled to the possession or to the receipt of the rents and profits of the hereditaments devised by this will. I agree that the meaning of these words is this. "Possession" and "receipt" are contrasted because some part of an estate may be in hand not producing rents and profits. "Possession" means possession of such parts of the estate as are not producing rents and profits ; and "entitled to the receipt of the rents and profits," refers to such parts of the estate as are let. The earl became earl while he was an infant—as in fact he still is—after the preceding estate had determined, and under these limitations he was entitled in possession as contrasted with being entitled in reversion. It is also to be observed that it was a legal estate. The question is, Does this clause mean entitled in possession as contrasted with entitled in reversion ? Certainly it does not say so. These are not the words. It is not "entitled in possession," which is the ordinary phrase to contrast a title in possession with a title in reversion, but it is "entitled to the possession or to the receipt of the rents and profits of the said hereditaments and premises." Now, in terms that does not apply to the earl.

(KAY, L.J.)

By what is called the management clause it is provided: [The Lord Justice read part of the management clause, and continued:] During his minority the trustees are to enter into the possession or receipt of the rents, issues, and profits, and during such minority they are to hold and continue such possession or receipt, to manage the estate, out of any moneys coming to their hands to pay the expenses of such management, and to capitalise the residue of the rents. So during his minority undoubtedly he is not entitled to receive one farthing of the rents, or to the possession of any property which does not produce rents. The trustees are entitled to that possession and receipt; and he is not beneficially entitled, because the rents and profits are not to be paid to him. He never will be entitled to anything except such sums as the trustees think fit to allow for his maintenance. Therefore he cannot be entitled to the possession of any of the land, nor can he be entitled to the rents and profits of any land which is devised by this will. Consequently, when the earldom devolves upon him, he says, "I am not the person entitled to the rents and profits of this estate, and therefore the shifting clause does not apply." It is answered that in various parts of the will the words "entitled to possession or receipt of the rents and profits" are used so as to show that in the opinion of the testatrix an infant might be entitled. I agree; but we have got to deal with this particular clause. I agree that it is extremely difficult to see any reason why the testatrix should provide that if the earldom descends on an adult who is entitled in possession the estate shall shift, but if on an infant whose estate is an estate in possession it shall not shift. I admit I fail to see any reason for that, but because I cannot see any reason for it am I to depart from the words of the will? We have asked counsel to tell us what their notion of the plan of the will is, and they have given no satisfactory answer.

I agree most entirely with the canon of construction which obliges us, before we can say that an estate which has been clearly given has gone over, to find that the exact event upon which the gift over is to take effect has happened. I cannot find that here. The event which the words contemplated has not happened, and the estate does not go away from the infant earl. I think the

decision of the learned Judge must be affirmed, and the appeal dismissed.

Appeal dismissed.

Solicitors: *Tatham & Pym*, for the Appellant.

Russell-Cooke & Co., for the Respondents.

DAVIS v. LEICESTER CORPORATION.

1894, April 4. LINDLEY, LOPES AND KAY, L.JJ.

Vendor and Purchaser—Restrictive Covenant—Building Scheme—Municipal Corporation—Disposition of Corporate Land—Approval of Treasury—Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 108, 109.

Although in ordinary cases, where the conditions of sale subject to which a sale, whether by auction or by private contract, is made, state that every purchaser shall enter into certain restrictive covenants limiting, for the benefit of the adjoining land, his right of user of the land conveyed to him, such conditions constitute a scheme enforceable by any purchaser against the vendor and any other purchaser with notice; yet, if the vendor be a municipal corporation, sections 108, 109 of the Municipal Corporations Act, 1882, make it necessary that the approval of the Treasury (or, since the Local Government Act, 1888, of the Local Government Board) should be obtained not only to the conveyance to the purchaser, but also to the restrictive covenants on the vendor's part which are to be implied from the conditions. If, therefore, the Treasury has consented only to the conveyance and not to the implied covenants, such covenants cannot be enforced against the corporation, or against other purchasers from them even with notice.

Semble (per KAY, L.J.), to establish that the Treasury have approved of such a scheme, it is not enough to show that having had constructive notice of it, they have approved the sale; it must appear that they have had full knowledge, and have deliberately signified their approval, of the scheme.

APPEAL from North, J.

In March, 1888, the defendants the Corporation of Leicester offered for sale by auction (together with other land in the Borough) a plot of land consisting of fifteen lots, numbered as lots 18 to 32 inclusive. The whole of the land put up, was offered subject to printed particulars and conditions, which, so far as material, provided that the lots were offered subject to the approval of the council of the Borough, and of the Lords of the Treasury (the approval of the Treasury being required by sections 108, 109 of the Municipal

Corporations Act, 1882), and that if the vendors could not make out a good title to any lot, or if the necessary approval could not be obtained, the vendors should be at liberty to rescind the contract. Certain special conditions applicable only to lots 18 to 32 provided that each purchaser should enter into certain covenants, imposing restrictions upon his use of the land purchased by him, particularly with reference to the nature and position of the buildings which might be erected thereon. None of the fifteen lots were sold at the auction.

In May and June, 1888, it was arranged that lots 31 and 32 should be divided into three, and that two of the three portions should be sold to the plaintiff. The formal contract, which was signed on 27 June, 1888, was in a form annexed to the particulars and conditions, and provided that the purchase should be completed subject to the conditions, so far as the same were applicable to each lot "and to a sale by private contract."

In 1887 the Treasury had approved generally of a preliminary scheme for the sale of certain land of the borough, including all the fifteen lots except lot 26. The scheme was submitted to the Treasury along with a plan and valuation, and described the land generally as "building land," but specified no conditions or terms of sale. On 29 August, 1888, the council presented to the Treasury a memorial, praying for the approval of the sale to the plaintiff, and on 4 September, 1888, the sanction of the Board was given.

By deeds dated 23 November, 1888, the corporation "as beneficial owners," and in consideration of an aggregate sum of 1,832*l.* 3*s.* 6*d.* conveyed to the plaintiff the lands purchased by him, the approval of the Treasury being signified in the usual way, by two of the Lords of the Treasury joining in the conveyances. Each deed recited that the corporation had some time since contracted with the plaintiff for the sale, and referred to the contract of 27 June, 1887, and by each deed the purchaser entered into restrictive covenants, corresponding to the conditions of sale already mentioned, but there were no express covenants by the corporation.

In 1890 the plaintiff agreed to purchase lot 30 from the corporation. The transaction was carried through in the same manner as the former purchase, except that the consent of the Local Government Board, which by section 72 of the Local

Government Act, 1888 (51 & 52 Vict. c. 41), is substituted for the Treasury, was applied for and obtained. The conveyance was executed in May, 1891.

On 25 April, 1893, the corporation entered into an agreement to sell lots 18 and 19 to the defendants the trustees of St. Stephen's Presbyterian Church, on terms which empowered the purchasers to erect on the land, in addition to the buildings allowed by the printed conditions already mentioned, a church or chapel with a hall, and to adopt a building-line approaching much nearer to the road than those conditions would have permitted. On 13 May, 1893, a formal contract, in the printed form already mentioned, with modifications embodying these altered terms, was signed by both parties. The defendant trustees, having been let into possession, had commenced the erection of a church, and had approached still nearer to the road than the building-line fixed by their contract.

On 16 November, 1893, the plaintiff commenced this action, claiming an injunction to restrain the defendants from erecting or permitting to be erected on lots 18 and 19 any church or chapel, or any other building other than such as were authorized by the conditions of sale issued in March, 1888, and from committing any other breach of those conditions. On 15 December, 1893, the plaintiff moved before NORTH, J., for an interlocutory injunction. In giving judgment on 27 February, 1894, the learned Judge expressed himself satisfied that at the time of the two sales to the plaintiff the corporation were still carrying on the building scheme first put forward in 1888, and held that if the vendors had been private individuals, and not a municipal corporation, the plaintiff would have been entitled to the injunction he claimed, but that the consent of the Treasury (or the Local Government Board) was necessary, and had not been obtained, to a disposition in favour of the plaintiff of any right or interest in any lands other than those actually conveyed to him. He therefore refused the motion. The plaintiff appealed. By consent the hearing of the appeal was treated as the trial of the action.

S. Hall, Q.C., and Dunham, for the appellant:

We are entitled to the benefit of the restrictive covenants into which, according to the conditions of sale of March, 1888, the

defendant trustees ought to have entered: *In re Birmingham and District Land Co. and Allday* (1), *Spicer v. Martin* (2).

The plaintiff's conveyances refer to the contracts for sale, and therefore the Treasury and the Local Government Board had notice of and confirmed those contracts, which embody the building scheme of 1888.

But, in any case, the consent of the Treasury was not necessary to the restrictive covenants which we seek to imply on the part of the vendors. Such covenants are not within the terms of sections 108, 109 of the Municipal Corporations Act, 1882. A seal is not necessary to bind the corporation: *Wilson v. West Hartlepool Railway* (3), *Crook v. Seaford Corporation* (4).

[They also cited *London and South-Western Railway Co. v. Gomm* (5) and *Mackenzie v. Childers* (6).]

Swinfen Eady, Q.C., and *F. Thompson*, for the respondents the Corporation of Leicester, and *Everitt, Q.C.*, and *McSwinney*, for the respondents the trustees of St. Stephen's Presbyterian Church, were not called upon.

LINDLEY, L.J.: The objection which has been taken is one I do not see my way to get over. The case is a peculiar one. [The Lord Justice shortly stated the facts, and continued:] Now, it is nevertheless asserted, and I think it is correctly asserted, that, assuming the corporation to stand on the footing of an ordinary vendor, the terms and conditions upon which this property was bought entitled the purchasers to the benefit of the restrictive stipulations introduced for the benefit of everybody who was buying according to the terms and conditions printed and circulated at the time of the sale by auction, or, in other words, that the purchaser of each lot purchased upon the terms that he should be entitled to the benefit of those restrictive stipulations. I

(1) 3 R. 84; [1893] 1 Ch. 342; 62 L. J. Ch. 90; 67 L. T. 850; 41 W. R. 189.

(2) 14 App. Cas. 12; 58 L. J. Ch. 309; 60 L. T. 546; 37 W. R. 689.

(3) 2 De G. J. & S. 475; 34 L. J. Ch. 241; 11 L. T. 327, 692; 13 W. R. 4, 361.

(4) L. R. 6 Ch. 551; 25 L. T. 1; 19 W. R. 938.

(5) 20 Ch. D. 562; 51 L. J. Ch. 530; 46 L. T. 449; 30 W. R. 620.

(6) 43 Ch. D. 265; 59 L. J. Ch. 188; 62 L. T. 98; 38 W. R. 243.

am disposed to follow the judgment of Mr. Justice NORTH on that point.

Then comes the difficulty which is peculiar to this case. The vendor here was not an ordinary person *sui juris*, but a corporation, bound in dealing with its property by the provisions contained in the Municipal Corporations Act, 1882, which, as we all know, is a consolidation, with one or two amendments, of the previous Municipal Corporations Act, 1835, and the subsequent Acts amending it. In order to understand the restrictions imposed by those Acts upon municipal corporations in dealing with their own property, we must look back and see what great alterations were made in 1835. Prior to 1835, as the case of *Colchester (Mayor) v. Lowten* (7) shows, a municipal corporation could sell and dispose of its property. The argument by the *Attorney-General* in that case was that the corporation property was trust property, and that the corporation were fettered in their disposal of it. Lord ELDON decided the contrary. The great change introduced in 1835 was to make the property of municipal corporations trust property, and that was done, so far as real estates were concerned, by throwing the rents and profits into what is called the "borough fund," and the borough fund, including the rents and profits of the land of the corporation, could only be dealt with, under the Act of 1835, in a certain specified manner set forth in that Act. That altered the whole position of the property of municipal corporations, and the alteration has been continued from 1835 down to the present time; and in the present Act of 1882 (section 139) we find the old provisions in the Act of 1835 respecting the borough fund reproduced. That is the section that prevents municipal corporations from doing what they like with their own property.

We have then to deal with certain other sections, viz. sections 108 and 109, of the Municipal Corporations Act, 1882. These sections must be construed with reference to the alterations made in 1835, which transformed the property of municipal corporations into trust property. Section 108 is a negative one: (i.) "The council shall not, unless authorized by Act of Parliament, sell mortgage, or alienate any corporate land without the approval of

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the Treasury." Then : (ii.) " The council shall not, unless authorized by Act of Parliament, lease or agree to lease any corporate land without the approval of the Treasury:" then come certain exceptions, with which we need not trouble ourselves. It is plain that the council cannot sell, mortgage, or alienate any land without the approval of the Treasury. Then comes section 109, an enabling section, but an enabling section which contains in it a negative stipulation : " The council may, with the approval of the Treasury, dispose of any corporate land either by way of absolute sale, or by way of exchange, mortgage, charge, demise, lease, or otherwise, in such manner and on such terms and conditions as the Treasury approve." Now, reading that in connexion with the clause relating to the borough fund, what does it mean ? It means this : that although this property of yours is no longer, as it was, your own property, so that you could do what you liked with it, although it is converted into trust property, and you are fettered in your disposal of it, you may, with the consent of the Treasury, do certain things. That means, as I understand it, that you cannot do those things without the consent of the Treasury.

Now, what have the corporation done here ? They have obtained the consent of the Treasury to the conveyance of the various lots purchased by the plaintiff in this case. But, whether by oversight or otherwise I do not know, they have not obtained the consent of the Treasury to the disposition of any lot upon the terms that the owner of that lot shall have rights, negative or affirmative, over any other land of the corporation. That raises a very great difficulty ; to my mind, an insuperable difficulty. We are asked, in the face of that omission, be it intentional or not, to infer some obligation on the part of the corporation to fetter themselves in the disposal of land not sold to the plaintiff ; in other words, we are asked to say that, although the Treasury have never been consulted on the subject, the land sold to the plaintiff has been disposed of upon such terms and conditions as entitle him to say to the corporation, " You have come under an obligation to me to preserve other property in a particular shape, and not to sell it, except subject to certain specified conditions." I think we have no right at all to infer such an obligation. It is not to be found in the conveyance,

as I have already pointed out. There is no covenant to that effect. It is to be found, if it is to be found at all, upon the consideration of the building scheme; but in the face of the section to which I have referred, I do not think it would be right or proper judicially to draw in this case the inference we are asked to draw; that is to say, that the plaintiff has acquired rights upon other property not conveyed to him, the Treasury not having assented to it, and to impose upon the other property those restrictions and fetters which the plaintiff seeks to put upon it. I think that is a fatal blot in the plaintiff's case, and that Mr. Justice NORTH's view on this particular point is as well founded as his view in favour of the plaintiff on other points.

I am of opinion that this appeal must be dismissed.

LOPES, L.J.: I am of the same opinion. The plaintiff contends that he is entitled to the benefit of certain restrictive covenants affecting land other than that which he bought, the restrictive covenants appearing in the conditions of sale under which he purchased. The particular condition—condition 12—relating to the lots which he bought is in these words: [The Lord Justice read condition No. 12 of the special conditions of sale, and after stating the nature of the plaintiff's claim, continued:] Now I will assume that the plaintiff is entitled to the injunction he claims, subject to the provisions of the Municipal Corporations Act, 1882, and particularly to those two sections which have been referred to by my brother LINDLEY; I mean sections 108 and 109. But after careful consideration it appears to me that these two sections ought to be read together, and that the true meaning of the two sections read together is this, that the council are not in any circumstances, unless authorized by Act of Parliament, to sell any corporate land without the approval of the Treasury, but that with the approval of the Treasury they may dispose of any corporate lands in any manner, on any terms, and on any conditions, provided such terms and conditions are approved of by the Treasury. It appears to me that that is the proper reading of those two sections; and it must be remembered that the object the Legislature had in view was to prevent any corrupt or improvident dealing with the corporate property. If that is the true reading of section 109, which is the

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important section in this case, let us see what has happened here. The sale of these lots which the plaintiff has purchased has, beyond all question, been approved of by the Treasury. The conveyance has been submitted to them, and, in point of fact, they are parties to that conveyance. But in that conveyance no restrictive covenants of any sort or kind affecting these particular lots upon which the chapel is proposed to be erected appear. There is no notice of any restrictive covenants. In point of fact, as far as I understand, the building scheme has never been brought to the notice of the Treasury. There is nothing in the conveyance, nor in anything which came before the Treasury, to give them notice or warning of any of the restrictive covenants which are relied upon by the plaintiff in this case. That being so, the conclusion at which I arrive is that it is impossible to say that, in the words of section 109, these conditions—because they cannot be called anything but conditions—have been approved of by the Treasury.

I think, therefore, that the conclusion at which Mr. Justice NORTH arrived was the right one.

KAY, L.J. : I only desire to add a few words out of respect to the very ingenious argument which has been addressed to us. It is important to observe that the nature of this action is an action for specific performance of an alleged agreement, which is not expressed, but is to be implied. The writ is endorsed for an injunction to restrain the defendants from departing from the terms of that alleged implied agreement, and, of course, that is only a mode of obtaining specific performance of that agreement in a Court of equity.

Now, what is the agreement? [The Lord Justice stated the facts, and continued :] In the conveyance to the plaintiff there is no contract whatever by the corporation that the rest of the land shall be dealt with according to the building scheme. The plaintiff has no contract with the corporation to that effect, except that which may be implied from the conditions contained in the original building scheme, which I have said were conditions that each purchaser should contract with the vendor to observe that building scheme. But I do not doubt for a moment that the learned Judge was

quite right in saying that if this had been a transaction between individuals the effect would have been to bring this case within the well-known decisions which are referred to in the House of Lords in *Spicer v. Martin* (2), and that there would have been an implied contract, not only between the purchaser and the vendor, but between other purchasers from the vendor and him, that the building scheme should be adhered to by the vendor and by such other purchasers. Accordingly this action would have been quite right if the vendors had been in the position of ordinary individuals ; but the difficulty in this case arises from the fact that the vendor here was a corporation, and therefore came within and was bound by the provisions of the statute of 1882. The sections which especially apply to this particular case are sections 108 and 109. Section 108 provides that a municipal corporation shall not sell, mortgage, or alienate any corporate land without the approval of the Treasury. That is a negative clause entirely, and takes away from them the power which originally corporations had at common law of dealing with land belonging to them. But then section 109 is differently worded, and I agree it is worded in an enabling form. [The Lord Justice read section 109, and continued :] Now, reading those two sections together, what is the meaning of them ? The first takes away all right of disposition from the corporation except with the approval of the Treasury ; the second defines what is meant by approval of the Treasury. They are not merely to approve of the corporation selling the land, but they are to approve of each particular sale when it comes to be made ; they are to approve the price ; they are to approve, to take the very words of the section, “ the terms and conditions ” on which that sale is made. I agree that the meaning of the two sections read together must be that the corporation shall not sell any land whatever, except with the approval of the Treasury ; and that approval shall be the approval of the particular sale and of the terms and conditions on which the particular sale is made. So read, the two sections are perfectly reconcilable, and the function of section 109 is to define what sort of approval is intended by the simple word “ approval ” in section 108.

In this case the building scheme has never been in any way before the Treasury. They never knew of it. The conveyance

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to the plaintiff does not mention the building scheme or those conditions and restrictions upon which the plaintiff now relies. They did see the conveyance. It was submitted to them, and two Lords of the Treasury were parties to it. They approved of that conveyance. I cannot at all agree with the proposition urged on behalf of the appellant, namely, that the conveyance, although it does not refer to the building scheme, and although it does not contain any contract by the vendors as to their dealings with the other land, still does refer to a contract under which the plaintiff bought, and that must have given the Treasury notice that there was a preceding contract, and therefore they had constructive notice of the terms of that contract. I never yet heard of the doctrine of constructive notice being pushed so far as to say that when a body in the position of the Treasury in this case had such constructive notice, they must be taken to have approved of that of which they had constructive notice. I should have thought that the doctrine which has always been observed in cases of election, waiver, and the like, viz. that in order to fix a person with election or with waiver of a right, it must be made out that he had the fullest knowledge of all the facts and of his rights, would apply *à fortiori* to a case of this kind. Before you can possibly fix the Treasury with approval of this building scheme, you must show that the Treasury had not merely constructive notice of it, but that they had full knowledge of it, and deliberately and intentionally signified their approval of it. Nothing of the kind is shown in this case. I do not even think they had constructive notice of it, as there is only a reference in the conveyance to the contract, and they are not bound to look any further than the conveyance. The conveyance was only submitted to them to see whether they approved of that particular sale of which the conveyance expressed the terms, and they did approve of that sale, but none of those terms which it is now sought to enforce were contained in that conveyance. Therefore I think that argument entirely fails. It does not impress my mind at all.

Then it was said that there was no disposition of the lands which the plaintiff did not buy, including the lands which the defendant trustees have since bought, and that, therefore, section 109 does not apply to the case. But I do not read section

109 in that way. There was a disposition to the plaintiff of the land which he bought, and he says that the terms and conditions of that disposition were that the corporation and other purchasers from them should be restricted in their dealings with the rest of the land. His whole case is that these were terms and conditions attached to the disposition of his land. That seems to me to be the very thing which was intended to be hit by section 109. If those terms and conditions are to be made binding on the corporation, they can only be so by being brought clearly to the knowledge of the Treasury and receiving the approval of the Treasury. Therefore the case is reduced to this, that the plaintiff is now seeking to bind the corporation and the other defendants, who have purchased other lands from the corporation, by an implied agreement from the building scheme, which he says was a term and condition of the disposition to him of the land which he bought, which alleged implied agreement, and which terms and conditions have never been submitted to the Treasury, and, of course, have not been approved by them. The answer is that such a thing would be altogether *ultra vires* of the corporation, because, as I read section 109, such terms and conditions attached to the sale of the particular lands which the plaintiff bought could not be made valid and binding upon the corporation without the approval of the Treasury. There was a very easy mode by which the plaintiff could have provided against this if he had chosen. No doubt it was first of all the duty of the corporation to obtain the approval of the Treasury; but the thing was in his own power too, because if he had chosen to have the terms and conditions expressed in his deed, then they would have been brought to the attention of the Treasury, and the difficulty would not have arisen.

I think, therefore, this appeal fails, and the decision of the learned Judge should be affirmed.

Appeal dismissed. Action dismissed.

Solicitors: *Morse & Simpson*, for *Parsons, Wykes & Davis*,
Leicester, for the Appellant.

Field, Roscoe & Co., for the Respondent Corporation.

Surr, Gribble & Co., for *R. & G. Toller & Sons*,
Leicester, for the Respondents the Trustees of St.
Stephen's Presbyterian Church.

GREENWOOD v. ALGECIRAS (GIBRALTAR) RY.

1894, March 20. LINDLEY AND A. L. SMITH, L.JJ.

Company—Action by Debenture-holders—Receiver—Power to Borrow to preserve Property—Emergency—First Charge—Sanction of Court—R. S. C., 1883, Order XVI. r. 9.

In a case of emergency, and when it is essential for the preservation of the property of a company, the Court has jurisdiction to authorize the receiver appointed in a debenture-holders' action to raise money as a first charge on the assets, in priority to the debenture-holders.

APPEAL from Kekewich, J.

In this case there were two actions, in the first of which the plaintiffs sued on behalf of themselves and all other the holders of debentures and debenture stock of the above-named company, and in the second on behalf of themselves and all other the holders of prior lien bonds, against the company and the trustees. The plaintiffs sought to obtain the realization of their securities and to have a receiver appointed. Judgment in favour of the plaintiffs had been given in both actions.

Funds amounting to nearly 2,000,000*l.* had been raised by the company and had been expended on the undertaking of the company.

Considerable damage to the undertaking had been caused by landslips that had recently occurred along the line of the railway which was carried through a mountainous district.

It was necessary that the repairs should be promptly executed, as otherwise the traffic would be discontinued, and the railway would be declared forfeited by the Spanish Government, which had assisted the company with money.

The damage had been partially repaired at the cost of 4,500*l.*, borrowed by the engineers in Spain on the security of the undertaking. According to Spanish law money borrowed for such a purpose forms a first charge on the undertaking.

A summons was accordingly taken out, on behalf of the defendants in both actions, to enable the receiver to borrow a sum, not exceeding 10,000*l.*, to repay the 4,500*l.*, and to cover necessary expenses for doing further repairs, and to charge the same upon the undertaking of the company in priority to all other charges.

On 19 March, 1894, KEKEWICH, J., although of opinion that it would be to the advantage of all concerned in the company that the order should be made, declined to make it, inasmuch as he doubted whether the Court had jurisdiction to do so unless all the debenture holders who were formally represented in the actions were personally present, having regard to the fact that the money, if raised, would have priority over the existing debentures.

The defendants appealed.

A. R. Kirby (Cozens-Hardy, Q.C., with him), for the appellants :

Under Order XVI. r. 9, any order made in these actions would be binding on all the debenture holders even though not personally present : *Watson v. Cave* (No. 1) (1).

Orders of the kind now asked for have been frequently made in Chambers : *Inman v. Cordova and North-Western Railway ; Copinger v. Santa Fé and Cordova Railway Construction Co.* (See Palmer's Company Precedents, 5th edit. p. 630, Forms 446, 449.) Leave is constantly given to receivers to expend moneys in necessary repairs, and such expenditure has priority to all other charges. The sum now sought to be raised is essential to preserve the property of the company for the benefit of all parties, and the case is one of emergency.

P. B. Abraham, for the plaintiffs, supported the appeal.

LINDLEY, L.J. : The orders which have been made in previous cases justify the Court in acceding to this application. The appeal must be allowed, and the order made as asked.

A. L. SMITH, L.J., concurred.

Solicitors : *Norton, Rose, Norton & Co., for the Appellants.*

Bompas, Bischoff, Dodgson, Coxe & Bompas, for the Respondents.

IN RE PONSFORD AND NEWPORT DISTRICT SCHOOL BOARD.

1894, January 17, 20. LINDLEY, KAY AND A. L. SMITH, L.JJ.

Burial Ground—Building on Unused Portion—“Set apart for interments”—Metropolitan Open Spaces Act, 1881 (44 & 45 Vict. c. 34), s. 1—Open Spaces Act, 1887 (50 & 51 Vict. c. 32), s. 4—Disused Burial Grounds Act, 1884 (47 & 48 Vict. c. 72), s. 3.

A piece of land which, in 1842, had been conveyed to a burial company and enclosed and used by them as a cemetery, was in 1878 by Order in Council closed. In 1885 a portion of the land, in which no interments had ever been made, was cut off from the rest of the cemetery by a wall. In 1890, by another Order in Council, the cemetery was closed with the exception of the unused portion. A contract had been entered into for the sale of this portion for building purposes. On a vendor and purchaser summons the Court of Appeal held (affirming NORTH, J.) that the cemetery must be looked at as a whole, and that the unused portion had been “set apart for the purposes of interments” and was a “disused burial ground” within the Metropolitan Open Spaces Act, 1881, and the Open Spaces Act, 1887, s. 4, and that consequently by section 3 of the Disused Burial Grounds Act, 1884, no building could be erected on the same.

A “disused burial ground” now, therefore, means a piece of ground set apart for interments, in which interments have or have not taken place, whether it has been partially or wholly closed under any statute or Order in Council or has become otherwise disused.

APPEAL from North, J.

In 1842 a piece of land, afterwards known as the “Old Cemetery,” Newport, was conveyed to trustees for a company known as the Newport Cemetery Company, and was enclosed by them for the purposes of a cemetery, in parts of which from time to time interments took place. The ground was never consecrated, but roads and paths were made in it, and a chapel was erected. By an Order in Council in 1878 burials were ordered to be discontinued in the Old Cemetery. In 1885 a portion of the cemetery, consisting of nearly one-half, and in which no interments had taken place, was separated by a wall from the rest of the cemetery, and was conveyed to trustees for sale. This unused portion was coloured green on a plan that was put in evidence, the other portion being coloured blue. In 1890, by another Order in Council,

burials were ordered to be discontinued in the Old Cemetery except in the portion coloured green on the plan. In 1891 the trustees sold the unused portion to Ponsford, and he, in 1893, contracted to sell the same to the Newport District School Board, who were desirous of building a school thereon. The purchasers took the objection that by reason of the Metropolitan Open Spaces Act, 1881, s. 1 (1), the Disused Burial Grounds Act, 1884, s. 3, and the Open Spaces Act, 1887, s. 4, the whole of the Old Cemetery, the unused as well as the used portion, having been set apart for purposes of interment, was a disused burial ground upon which it was not lawful to erect buildings. A summons under the Vendor and Purchaser Act, 1874, was then taken out by the purchasers for the determination of the validity of their objection. NORTH, J., on 8 November, 1893, decided that the purchasers' objection was well founded, and that the portion of ground in question, having been set apart for purposes of interment, was now a disused burial ground, and therefore could not be used for building.

The vendor appealed.

Bailhache, for the appellant :

The particular piece of ground in question was never set apart as a burial ground; no interments have taken place in it, and it is not therefore a disused burial ground. Further, in order to constitute a burial ground the land must be exclusively and

(1) The Metropolitan Open Spaces Act, 1881 (44 & 45 Vict. c. 34), s. 1, provides that "the term 'burial ground' shall include any ground, whether consecrated or not, which has been at any time set apart for the purposes of interment, and in which interments have taken place since the year 1800."

The Disused Burial Grounds Act, 1884 (47 & 48 Vict. c. 72), s. 3, provides that "It shall not be lawful to erect any buildings upon any disused burial ground, except for the purpose of enlarging a church, chapel, meeting-house, or other places of worship."

The Open Spaces Act, 1887 (50 & 51 Vict. c. 32), s. 4, provides that "In the Disused Burial Grounds Act, 1884, and this Act, the expression 'burial ground' shall have the same meaning as in the Metropolitan Open Spaces Act, 1881, as amended by this Act, and the expression 'disused burial ground' shall mean any burial ground which is no longer used for interments, whether or not such ground shall have been partially or wholly closed for burials under the provisions of any Statute or Order in Council, and the expression 'building' shall include any temporary or moveable building."

irrevocably set apart : *Foster v. Dodd* (2). Here, under the deed of settlement, the ground was "set out" for purposes of interment, which is not the same thing as "setting apart" for such purposes, and the trustees were by the deed empowered to sell or let portions of the land.

E. Ford, for the respondents :

It is clear from the plan and from the situation of the chapel and roads and paths, that the whole of the ground was set apart for interments. I know of no authority for the contention that an irrevocable and exclusive setting aside is necessary to constitute a burial ground. The purchasers would be liable to proceedings at the suit of the Attorney-General if they built upon this land, and consequently they ought not to be compelled to take it.

Bailhache replied.

LINDLEY, L.J. : The true construction of these Acts of Parliament is not very easy, but still I have no doubt that in an action for specific performance the purchaser ought not to be compelled to take a title which would expose him to the risk of an indictment or an information by the Attorney-General for building on the land purchased. The first point is whether, in construing the Acts, we are to take this cemetery, *i.e.*, all the land known as the Old Cemetery, as a whole, and see whether it has been set apart as a cemetery for interments, or whether we should regard it as subdivided into pieces and see whether each piece has been so set apart. In my opinion we ought to look at the cemetery as a whole, and not in pieces, and, looking at it as a whole, it appears to me that it has in fact been set apart for the purposes of burial. I think this is so notwithstanding the clause in the deed of settlement providing that the trustees may sell or let any part of the land. The Disused Burial Grounds Act, 1884, says (section 3) that it shall not be lawful to erect any buildings upon any disused burial ground. What is meant by a "disused burial ground" ? For that we must look at the Acts of 1881 and 1887. Section 1 of the Metropolitan

(2) L. R. 1 Q. B. 475 ; 35 L. J. Q. B. 136 ; 14 L. T. 327 ; 14 W. R. 607 ; affirmed L. R. 3 Q. B. 67 ; 37 L. J. Q. B. 28 ; 17 L. T. 614 ; 16 W. R. 155 ; 8 B. & S. 842—Ex. Ch.

Open Spaces Act, 1881, enacts that "the term 'burial ground' shall include any ground, whether consecrated or not, which has been at any time set apart for the purposes of interment;" and then follow some words which have been repealed. Section 4 of the Open Spaces Act, 1887, enacts that "in the Disused Burial Grounds Act, 1884, and in this Act, the expression 'burial ground' shall have the same meaning as in the Metropolitan Open Spaces Act, 1881, as amended by this Act." Those last words refer to the schedule in the Act of 1887, which strikes out from section 1 of the Metropolitan Open Spaces Act, 1881, the words "and in which interments have taken place since the year 1800." Then section 4 of the Act of 1887 goes on: "and the expression 'disused burial ground' shall mean any burial ground which is no longer used for interments, whether or not such ground shall have been partially or wholly closed for burials under the provisions of any statute or Order in Council." Now putting these enactments together and applying them to this case, and looking at the Old Cemetery as a whole, it appears to me that it cannot be built on at all. In my opinion, therefore, the purchaser is right in his objection, and this appeal must be dismissed.

KAY, L.J.: I am of the same opinion. The facts of this case are somewhat complicated, and so are the statutes relating to the matter, but I think when both the facts and the statutes are considered there is no reasonable doubt that the decision of the learned Judge below was correct.

In 1842 a piece of land was conveyed to trustees for the Newport Cemetery Co. The company then entered upon the land and enclosed it, but it has never been consecrated. Burials however were made therein until the year 1878, when the first Order in Council was made proscribing any further burials. I should mention that shortly after the company came into possession of the land a chapel had been built and roads and paths had been laid out and made. In the year 1885 a considerable portion of this land in which no interments had taken place was separated by a wall from the remaining portion, and was conveyed to trustees for sale. In the year 1890, by another Order in Council, burials were ordered to be discontinued in the part of the cemetery

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that had been used for that purpose, but the unused portion, which had been surrounded by the wall, was excepted from its provisions. In the year 1891 these trustees for sale sold the unused portion to Mr. Ponsford, and he, in 1893, agreed to sell that unused portion to the Newport District School Board. The school board then took the objection that this land having been set apart for the purposes of interment was a disused burial ground and consequently that it was unlawful to erect any buildings thereon.

The question now arises as to whether this objection of the purchasers is a valid one.

Let me first deal with the Disused Burial Grounds Act, 1884. Section 3 of that Act provides that after the passing of the Act it shall not be lawful to erect any buildings upon any disused burial ground except for the purpose of enlarging a church, chapel, meeting house, or other places of worship. This exception does not apply to the present case, and therefore we have to deal with the first part of the section alone. The phrase "disused burial ground," by section 2 of the same Act means a burial ground in respect of which an Order in Council has been made for the discontinuance of burials therein in pursuance of the Acts therein recited. Suppose that had been the condition of the law at the present time, and that an Order in Council had been made forbidding any further burials in this cemetery, the whole of the land would then have been within the very words of the Act, a "disused burial ground."

We now come to the Acts which have caused some difficulty.

The definition of "disused burial ground" in the Act of 1884 has been altered by the Open Spaces Act, 1887. It, by section 2, in the first place altered the meaning of the expression "burial ground" in the Metropolitan Open Spaces Act, 1881. The Act of 1881 provides that the term "burial ground" shall include any ground, whether consecrated or not, which has been at any time set apart for the purposes of interment, and in which interments have taken place since the year 1800. That definition in the Act of 1881 is in part repealed as I have said by section 2 of the Open Spaces Act, 1887, so that now the definition omits the words "and in which interments have taken place since the year 1800." Therefore, now the

term "burial ground" means any ground consecrated or not which has at any time been set apart for the purposes of interment. That, to my mind, clearly means whether any interment has taken place in it or not. Therefore, the phrase "burial ground" includes ground set apart for interments, even though no interments have taken place therein.

As to the phrase "disused burial ground," section 4 of the Open Spaces Act, 1887, provides that it shall mean any burial ground which is no longer used for interment, whether or not such ground shall have been partially or wholly closed for burials under the provisions of any statute or Order in Council. This alters the meaning of the phrase "disused burial ground" in the Act of 1884, which latter Act, as I have said, by section 2 provides that it shall mean a burial ground in respect of which an Order in Council has been made for the discontinuance of burials therein. So that now these words mean a piece of ground set apart for interments in which interments have or have not taken place, whether such ground has been partially or wholly closed for burials under an Order in Council or the provisions of a statute. But it is contended that this land that has been contracted to be sold has never been set apart as a burial ground. In my opinion, however, this ground was set apart as distinctly as any ground could be for the purposes of burial, even though no burial has ever taken place in it.

I therefore am of opinion first, that this ground is a burial ground although no interments have taken place in it, and secondly, that it is a "disused burial ground" under the Act of 1884 as altered by the Act of 1887. If this were not the conclusion to be drawn from these statutes, a piece of ground in the middle of a cemetery in which no burials had actually taken place and which was surrounded on all sides by graves could not be treated as a disused burial ground. It was argued by the appellant that the words "set apart for the purposes of interment" must mean irrevocably set apart for that purpose, but I can find nothing in the Act of 1881, or in the other Acts to which I have referred, to bear out this contention.

I think, therefore, that this appeal must be dismissed.

A. L. SMITH, L.J.: The question we have to decide is whether this piece of land has been set apart for the purposes of interment. If

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it has, the appellant fails; if it has not, he succeeds. His counsel has argued the case exceedingly well, but he has taken a number of isolated facts, and has said this does not and that does not and the other does not constitute a setting apart within the meaning of the Act of Parliament. He is entitled to put his argument in that way, but we must look at all the facts taken together in and since the year 1842 to ascertain whether these four acres of land were or were not set apart for the purposes of interment. In 1842 the land was bought for the purposes of interment and was then enclosed by a wall for those purposes. Roads and paths were made over the ground in which interments took place, the roads being such as were necessary and convenient for carrying out interments, and a chapel was erected thereon for those purposes. In my opinion the whole of this land was set apart for the purposes of interment. As Lord Justice LINDLEY has said, the whole must be looked at together and not at any particular part in order to see whether there has been a setting apart of the land. I think consequently that the purchaser's objection is well founded, and that the appeal must be dismissed.

Appeal dismissed.

Solicitors : *Daubeny & Mead*, for *J. Hutchins*, Newport, Mon., for the Appellant.

Warriner & Kinch, for *Lloyd & Pratt*, Newport, Mon., for the Respondents.



BOYD v. BISCHOFFSHEIM.

1894, October 24, 25. LINDLEY AND A. L. SMITH, L.JJ.

Appeal—Vacation Judge of Court of Appeal—Interim Order—Application to Vary—Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 52—Supreme Court of Judicature (Procedure) Act, 1894 (57 & 58 Vict. c. 16), s. 1, subs. 1 (b).

An application, under section 52 of the Judicature Act, 1873, to discharge or vary an interim order made during vacation by a single Judge of the Court of Appeal, is not an "appeal" within the meaning of s. 1, subs. 1 (b) of the Supreme Court of Judicature (Procedure) Act, 1894. Such an application may, therefore, be made without such leave as the latter section requires in the case of interlocutory appeals.

ORIGINAL motions to vary an order of Lord Russell of Killowen, C.J.

On 16 October, 1894, Lord RUSSELL of Killowen, C.J., sitting in chambers as a vacation judge of the Court of Appeal, made, under section 52 of the Judicature Act, 1873, an order requiring the plaintiff to give security for the costs of a pending interlocutory appeal by him against an order of NORTH, J.

Section 52 of the Judicature Act, 1873, provides that any order made thereunder by a single judge of the Court of Appeal "may be discharged or varied by the Court of Appeal." By section 1 of the Supreme Court of Judicature (Procedure) Act, 1894, the leave of the Judge appealed from or of the Court of Appeal is made necessary (except in certain cases) to an appeal from any interlocutory order or judgment.

The plaintiff and the defendants each now applied by original motion to vary the order of 16 October, 1894.

Cozens-Hardy, Q.C., and Gregson, for the defendant E. R. McDermott.

Turrell, for the plaintiff.

[LINDLEY, L.J. : Does not the Act of 1894 repeal section 52 of the Judicature Act ?]

No. This is not an "appeal" within section 1, subsection 1 (b), of the Act of 1894.

Alexander Young, and Pollard, for the other defendants.

LINDLEY, L.J. : The question in this case is whether the Supreme Court of Judicature (Procedure) Act, 1894, applies. I do not think it does. The application is under section 52 of the Judicature Act of 1873. That section appears to me not to be repealed or affected by the Act of last September. We expressed that opinion yesterday; and now, on looking into the matter, I still take the same view. Then it comes to be simply an application for security for costs. [The Lord Justice then dealt with the facts of the application, coming to the conclusion that the plaintiff's motion must be refused, and that the order ought to be varied by the insertion of the usual clause as to a stay of proceedings.]

A. L. SMITH, L.J. : I agree. I am satisfied that the legislation under which this application is made is not touched at all by the Act of last session as regards appeals in interlocutory matters to this Court.

Order varied.

Solicitors : *W. C. Goulding*, for the Plaintiff.

*Hores & Pattisson; John Holmes & Son; and Freshfields
& Williams*, for the Defendants.

KEMP v. WRIGHT.

1894, November 5. LORD HERSCHELL, L.C., LINDLEY AND
A. L. SMITH, L.JJ.

Building Society—Instrument of Dissolution—Liability of Advanced Members to Pay Balance at once—Statute—Retrospective operation—Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 32—Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 10.

Where the rules of a building society incorporated under the Building Societies Act, 1874, provide that advanced members are to repay their mortgage debts by instalments, an instrument for the dissolution of the society made pursuant to section 32 of the Act of 1874 can only contain the provisions set out in subsection 3 of that section, and consequently the instrument of dissolution can effect no change in the position of the advanced members as to their liability to pay the balances of their mortgage debts; they are therefore not liable to repay the amounts immediately.

Semble, the Court of Appeal must give effect to section 10 of the Building Societies Act, 1894 (providing that advanced members on the dissolution of a building society are only liable to pay in accordance with the terms of their contracts), though the Act was passed after the decision given in the Court below.

APPEAL from Kekewich, J.

The Charing Cross "Model" Building Society was established and incorporated under the Building Societies Act, 1874, on 20 December, 1887. One of its objects as stated in the rules was to raise funds by the subscriptions of its members to advance to them upon the security of freehold, copyhold, or leasehold property by way of mortgage. Alterations of rules were to be made by a majority of those present at a special general meeting. And in regard to repayments it was provided that after a member has mortgaged property to the society he should first pay the premium (if any) and then repay the principal by monthly instalments at the rate of 6*l.* per share per annum, and that such mortgagor might redeem his mortgage at any time by paying off the amount secured thereby.

By an instrument of dissolution made on 1 January, 1894, and registered pursuant to section 32 of the Act of 1874 (1), signed by

(1) The Building Societies Act, provides:—"A society under this Act 1874 (37 & 38 Vict. c. 42), s. 32, may terminate or be dissolved:—

not less than three-fourths of the members holding not less than two-thirds of the shares, provision was made for the dissolution of the society. Certain members had, prior to the date of this instrument, obtained advances on mortgage and the mortgage deed in each case contained a covenant by the mortgagor to repay according to the rules, and a proviso that the rules should apply as if incorporated therein, except so far as they might have been waived by the same.

The question raised was whether the advanced members were liable to pay up at once the unpaid balances of their respective mortgage debts, and KEKEWICH, J., on the authority of *Brownlie v. Russell* (2), held that they were so liable.

The decision was given on 10 May, 1894, and on 25 August the Building Societies Act, 1894, was passed, section 10 of which dealt with the liability of borrowing members in the event of dissolution (3).

The advanced members appealed.

1. Upon the happening of any event declared by its rules to be the termination of the society.

2. By dissolution in manner prescribed by its rules.

3. By dissolution with the consent of three-fourths of the members, holding not less than two-thirds of the number of shares in the society, testified by their signatures to the instrument of dissolution. The instrument of dissolution shall set forth:—

(a) the liabilities and assets of the society in detail;

(b) the number of members, and the amount standing to their credit in the books of the society;

(c) the claims of depositors and other creditors, and the provision to be made for their payment;

(d) the intended appropriation or division of the funds and property of the society;

(e) the names of one or more persons to be appointed trustees for the

special purpose, and their remuneration.

Alterations in the instrument of dissolution may be made with the like consent, testified in the same manner. The instrument of dissolution and all alterations therein shall be registered in the manner provided for the registration of the rules, and shall be binding upon all the members of the society.

4. By winding up, either voluntarily under the supervision of the Court, or by the Court if the Court shall so order”

(2) 8 App. Cas. 235; 48 L. T. 881.

(3) Section 10 of the Building Societies Act, 1894, provides that “when a society under the Building Societies Acts is being dissolved or wound up, a member to whom an advance has been made under any mortgage or other security or under the rules of the society shall not be liable to pay the amount payable under the mortgage or other security or rules, except at the time or times and subject to the conditions therein ex-

Cozens-Hardy, Q.C. and *T. R. Hughes*, for the appellants :

The decision in the Court below is wrong, and in any event, having regard to section 10 of the Act of 1894, it cannot now stand. [They referred to *Tosh v. North British Building Society* (4), *Auld v. Glasgow Working Men's Building Society* (5), and *Quilter v. Mapleson* (6), and section 14 of the Act of 1874.]

There is no case against a mortgagor that he should be bound immediately to pay, when by his covenant he has agreed to pay by instalments. The directly contrary view has been held by the Scotch Courts : *Scottish Provident Investment Co. v. Boyd* (7).

Frederic Thompson, for the respondents :

The instrument of dissolution operates under the Act of 1874.

[Lord HERSCHELL, L.C. : Where is there anything which turns a sum payable by instalments into a sum immediately payable?]

It is so in the case of a company. In *Brownlie v. Russell* (2) the order was that they should pay at once.

[Lord HERSCHELL, L.C. : But the judgment of Lord SELBORNE there turned on the true effect of a winding-up order. That a certain number of unadvanced members can constitute themselves a *vis major* in the sense in which it was used by the Vice-Chancellor in *In re Doncaster Permanent Building Society* (8), is rather a strong proposition. *Brownlie's case* (2) only went to the question whether he was bound to bear a part of the losses or on what terms he should redeem.]

The new statute of 1894 only applies where the voluntary winding-up or dissolution takes place after the passing of the Act : *Quilter v. Mapleson* (6) is not in point.

MacConkey, for the trustees, took no part in the argument.

pressed. This section shall come into operation immediately after the passing of this Act." The Act received the Royal Assent on 25 August, 1894.

(4) 11 App. Cas. 489 ; 35 W. R. 413.

(5) 12 App. Cas. 197 ; 56 L. J. P. C. 57 ; 56 L. T. 776 ; 35 W. R. 632.

(6) 9 Q. B. D. 672 ; 52 L. J. Q. B. 44 ; 47 L. T. 562 ; 31 W. R. 75.

(7) 12 Ct. Sess. Cas. (4th series) 127.

(8) L. R. 3 Eq. 158 ; 15 L. T. 270 ; 15 W. R. 102.

LORD HERSCHELL, L.C. : With all respect to the learned Judge I am unable to follow his judgment. It is not necessary to discuss whether the effect of a winding-up order be as extensive as is contended for by the respondents. This is a case of winding-up on dissolution. By section 32 of the Act of 1874, a dissolution of a society may take place with consent of three-fourths of the members holding not less than two-thirds of the number of shares in the society. By such consent a society may be dissolved against the will of the minority. In this case the requisite majority determined upon dissolution, and it was purely a matter for the shareholders in which the majority bind the minority and the instrument of dissolution had to set forth certain matters which are mentioned in subsection 3 of section 32. There is no provision beyond that; nothing to determine the rights of the members or provide that they should be other than they are by the contract made between them. The contention is, that whereas certain members have obtained advances and have covenanted to repay them according to the rules by instalments, upon the dissolution their liabilities are altered and the repayment becomes due at once. There is nothing in the section to indicate—there is nothing in the deed of dissolution to show, that this should be the effect. It is said that it has been held to be so in the case of a winding-up order, and therefore that it must also be so in case of dissolution by the parties. That such is the consequence I am unable to follow or to see the force of. The winding-up order is the act of the Court—*vis major*—and upon that all parties interested have the right to be heard. A minority prejudicially affected is entitled to see that no creditors are imposed upon them to the prejudice of their position by benefiting one class at the expense of another. But where the act is that of the majority the minority are at their mercy, and according to the argument of the respondents a majority consisting of unadvanced members might dissolve and bind by that dissolution the advanced members to new obligations never in terms undertaken. That appears to me to be unjust. As to authority, I find nothing in the provisions of the Act or in the instrument of dissolution to support it. The appropriation of the funds and property of the society is to be set out and the liabilities and assets. The assets are the obligations of the members. But there is nothing to show that on a

covenant to pay by instalments the effect is that the amount becomes payable immediately. For those reasons I think that the dissolution did not operate to alter in that way the obligations of the advanced members.

The point raised as to the statute is, I think, also a good one, although it is unnecessary to decide it after the decision on the other point. The society is being dissolved, but it is not yet completely dissolved, and the question arises whether the Act applies to the present case. The Legislature says, that in such a case advanced members are only liable to pay according to their contracts. The only answer is that the legislative enactment came into force after judgment was delivered and pending the appeal. But inasmuch as these advanced members are not yet compelled to pay otherwise than according to contract, I see no reason why effect should not be given to the obvious intention of the Legislature.

The appeal will be allowed.

LINDLEY, L.J.: I am of the same opinion. A man borrows money upon mortgage and covenants to repay by instalments. The lenders, by a majority, alter that and say that he must pay immediately. What right have they to do that? No right on any intelligible principle of law. It is said, that in a winding-up, those borrowers can be made to do this, and *Brownlie's case* (2) was cited in support of that proposition. That case does not go so far, and even if it does it is corrected by the new Act. But whether it does or not, section 32 of the Act of 1874 draws a distinction between dissolution and winding-up, and we are not concerned with the latter. I think there was a misapprehension on the part of the learned Judge as to the point decided in *Brownlie's case* (2). Apart from the Act I think the decision is wrong, and if there is a doubt about that case then the new Act removes it. The costs will come out of the funds of the society.

A. L. SMITH, L.J.: Mr. Justice KEKEWICH has held that an instrument of dissolution is equivalent to a winding-up order. There is no authority for that.

I have a word to add as to section 10 of the new Act. As

(A. L. SMITH, L.J.)

I read that section, it enacts that from 25 August, 1894, no matter what any Court has theretofore said about dissolution, where any society is being wound up or dissolved, advanced members are only to pay according to their covenants.

Appeal allowed.

Solicitors: *R. J. Jones & Co.*, Liverpool, for the Appellants.

J. F. Read, Liverpool, for the Trustees.

Alfred Stephenson, Liverpool, for the Respondents.



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Where a creditor, whose claim had been disallowed as barred by the Statute of Limitations in an administration action in England, obtained a decree for the amount of his claim and costs in a Scotch action and registered such decree in the Queen's Bench Division, the assets in the administration being still unadministered :

Held, that the Scotch judgment when registered was a new cause of action, and, such cause of action not being barred by the Statute of Limitations and not having been adjudicated upon, the judgment creditor, though not entitled to issue execution against the assets, was of course entitled to be admitted to prove for his debt in the administration.

Phosphate Sewage Company v. Molleson (see p. 641) distinguished. 346
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APPEAL—

(1.) *Leave to Appeal—Order sanctioning Scheme of Arrangement—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 124—Joint Stock Companies Arrangement Act, 1870 (33 & 34 Vict. c. 104), ss. 2, 4.*

A person who has not in any way been made a party cannot, even if bound or aggrieved by the order, appeal without leave against an

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order sanctioning a scheme of arrangement under the Joint Stock Companies Arrangement Act, 1870. *In re Securities Insurance Co. (Limited)* 217

(2.) *Time for*—Order made before 1 Jan. 1894—R. S. C., 1883, Order LVIII. r. 15—R. S. C., Nov., 1893 (Order LVIII. r. 15).

The time for appealing against a judgment or order dated before 1 Jan., 1894, when the rules of November, 1893, came into operation, is still regulated by the R. S. C., 1883. *Budgett v. Budgett* 321

(3.) *Vacation Judge of Court of Appeal*—Interim Order—Application to Vary—Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 52—Supreme Court of Judicature (Procedure) Act, 1894 (57 & 58 Vict. c. 16), s. 1, subs. 1 (b).

An application, under section 52 of the Judicature Act, 1873, to discharge or vary an interim order made during vacation by a single Judge of the Court of Appeal, is not an "appeal" within the meaning of section 1, subsection 1 (b) of the Supreme Court of Judicature (Procedure) Act, 1894. Such an application may, therefore, be made without such leave as the latter section requires in the case of interlocutory appeals. *Boyd v. Bischoffsheim* 629

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A notice in writing, under R. S. C. 1883, Order XX. r. 1 (b), requiring a statement of claim, is not a "step in the proceedings" within section 4 of the Arbitration Act, 1889, so as to preclude a defendant from afterwards applying under that statute to stay proceedings in the action.

Semble, "a step in the proceedings" means some application to the Court, and not verbal or written communications between the solicitors of the parties.

Where by a contract the engineers of a certain railway company are made arbitrators in all disputes, the fact that the engineers have in their capacity of engineers had before them and formed an opinion upon some or all of the questions which as arbitrators they will have to consider, is not a "sufficient reason why the matter should not be referred in accordance with the submission," within section 4 of the Arbitration Act, 1889. Proceedings will therefore be stayed under that section unless it can be shown that the engineers have been or are likely to be guilty of fraud or misconduct.

When some of the matters of difference arising under a certain contract are, but others are not, within an agreement to refer to arbitration, it is a question in the discretion of the Court whether those matters to which the submission applies should be referred, the action being left to proceed as to the remainder. One consideration to which the Court will attach weight is the comparative importance of the matters within the submission and of those outside it. *Ives & Barker v. Willans* 243

BANKER—Liability of Deceased Partner. *See PARTNERSHIP (2)* 167

BANKRUPTCY—

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Annulment—Duty of Disclosure—Material and Immaterial Facts—Secret Agreement.

A person who applies to the Court for an order must not mislead the Court, and must disclose to it all facts which are material for the purpose in hand; but he need not disclose immaterial facts.

On a petition for annulment of a bankruptcy, the only question the Court has to consider is (ordinarily) whether all the creditors have in fact consented; and therefore the fact that the bankrupt has agreed that in consideration of one of his creditors assigning his debt to trustees for the bankrupt at a certain price the bankrupt will pay a further sum to that creditor, is not a material fact, and such collateral agreement is not tainted with fraud merely because it was not disclosed to the Court or to the other creditors.

Seem, no concealment can in such a case be a ground for avoiding the transaction unless it appears that the creditor was a party to an agreement to conceal. *In re McHenry, McDermott v. Boyd, Ex parte Levita* 532

BUILDING SOCIETY—

Instrument of Dissolution—Liability of Advanced Members to Pay Balance at once—Statute—Retrospective Operation—Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 32—Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 10.

Where the rules of a building society incorporated under the Building Societies Act, 1874, provide that advanced members are to repay their mortgage debts by instalments, an instrument for the dissolution of the society made pursuant to section 32 of the Act of 1874 can only contain the provisions set out in subsection 3 of that section, and consequently the instrument of dissolution can effect no change in the position of the advanced members as to their liability to pay the balances of their mortgage debts; they are therefore not liable to repay the amounts immediately.

Seem, the Court of Appeal must give effect to section 10 of the Building Societies Act, 1894 (providing that advanced members on the dissolution of a building society are only liable to pay in accordance with the terms of their contracts), though the Act was passed after the decision given in the Court below. *Kemp v. Wright* . . . 631

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CHARITY—

(1.) *Mortmain and Charitable Uses Act*, 1891 (54 & 55 Vict. c. 73), ss. 5, 9—*Will made before, Death after, passing of Act—Wills Act* (1 Vict. c. 26), s. 24.

The Mortmain and Charitable Uses Act, 1891, applies to wills made before the Act by persons dying after the Act came into operation.

The combined effect of section 9 of the Mortmain and Charitable Uses Act, 1891, and section 24 of the Wills Act is, that where a testator devises or bequeaths to a charity all the property which he can by law so devise or bequeath, the charity will take whatever property answers this description at the testator's death. *In re Bridger, Brompton Hospital v. Lewis*

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(2.) *Interest in Land—Municipal Corporation Debenture Stock—Mortmain and Charitable Uses Act*, 1888 (51 & 52 Vict. c. 42), ss. 4, 10.

Debenture stock of a municipal corporation charged upon its general revenues, though in part derived from landed property, is not an interest in land within the meaning of the Mortmain and Charitable Uses Act, 1888, s. 4. *In re Pickard, Emsley v. Mitchell*

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(3.) *Endowment—Charitable Trusts Act*, 1853 (16 & 17 Vict. c. 137), ss. 62, 66—*Charitable Trusts Amendment Act*, 1855 (18 & 19 Vict. c. 124), ss. 1, 29, 48.

For the purposes of the Charitable Trusts Act, 1853, sections 62 and 66, (i.) income from any "endowment" means, *prima facie*, income derived from any invested funds; (ii.) but, in the case of a charity maintained partly by voluntary subscriptions and partly by the income of any endowment, bequests and donations for the general purposes of the charity which may lawfully be applied as income consistently with the terms of the gift are exempt from the jurisdiction of the charity commissioners; (iii.) and such gifts and the income thereof are not brought within the jurisdiction by being invested by the governors.

Consequently, land purchased by a charity, entitled to hold lands, out of the proceeds of sale of the investment of voluntary contributions applicable as income for the general purposes of the charity, does not require the consent of the charity commissioners to its being sold.

Governors of the Charity for the Relief of Poor Widows and Children of Clergymen v. Sutton (see p. 640) discussed. *In re Clergy Orphan Corporation*

549

CHATELS. See *LIS PENDENS* 469

COMPANY—

(1.) *Director—Qualification Shares—Register.*

Informal documents, such as share allotment sheets, intended merely to provide materials for compiling a formal register of members and not to be a register themselves, do not constitute a register within the meaning of section 25 of the Companies Act, 1862.

Where articles of association provided that if a first director failed to get his qualification shares within a month of the first general allotment his office should be vacated, and C., a first director,

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to whom the requisite shares were allotted without his knowledge, and who having acted as director within the month, resigned after the month had expired but before his name was, as it subsequently was, put on the register in respect of the shares, the Court ordered his name to be removed from the register as having been put on without sufficient cause. *In re Printing Telegraph & Construction Co. of the Agence Havas, Ex parte Cammell* 191

See *In re Hercynia Copper Co., Richardson's Case, infra* 644

(2.) — *Articles of Association—Share Qualification—Resignation before the Obligation to take Shares has arisen—Implied Agreement.*

Where by the articles of association of a company it is provided that directors who do not acquire their qualification shares within a specified period (e.g., three months) from their appointment shall be deemed to have agreed to take such shares from the company, directors who do not acquire the qualification, and resign within the time so limited, are under no obligation to take shares from the company, and cannot be placed on the list of contributories in respect of any agreement implied by the articles. (Lindley, L.J., dissenting.) *In re R. Bolton & Co., Salisbury-Jones, and Dale's case* 504

(3.) — *Shares held by a Director jointly with another Person, whether sufficient Qualification.*

A director's qualification shares may be held by him jointly with another person. *In re Glory Paper Mills Co., Dunster's Case* 456

(4.) — *Breach of Trust—Statute of Limitations—Trustee Act, 1888 (51 & 52 Vict. c. 59), ss. 1, 8—Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 10—Confirmation of Minutes of previous Meeting as evidence of concurrence in ultra vires resolutions of such Meeting.*

As directors are trustees of the assets of their company which come to their hands or which are under their control, the Statute of Limitations may, by virtue of section 8 of the Trustee Act, 1888, be pleaded by them where it is sought to make them liable for breach of trust for the improper application of such assets.

Directors whose sole connexion with an improper application of assets is their being present at the directors' meeting which confirms the meeting at which the improper application was resolved upon, cannot thereby be held to concur in the improper application. *In re Lands Allotment Co.* 115

(5.) *Debenture—Time of Payment—Acceleration—Winding up.*

By the compulsory winding up of a company under the Companies Acts before the date fixed for payment of its debentures, the time of payment is accelerated and the debenture-holders are entitled to realise their security for the full amount.

In re Panama, New Zealand and Australian Mail Co. (see p. 640) and *Hodson v. Tea Co.* (see p. 640) followed. *Wallace v. Universal Automatic Machines Co.* 316

(6.) *Debentures—Securities deposited in the Land Registry under the Mortgage Debenture Acts, 1865 and 1870—Delivery to Receiver in Debenture-holder's Action—Jurisdiction—Mortgage Debenture Act, 1865 (28 & 29 Vict. c. 78), ss. 3, 4, 6, 7, 10, 16, 41, 46—Mortgage Debenture Act, 1870 (33 & 34 Vict. c. 20), ss. 4, 7, 8, 9, 10.*

Where securities belonging to a company have been deposited in the Land Registry under the Mortgage Debenture Acts, 1865 and 1870, there is no jurisdiction to make an order for the delivery out of such securities, either to the company or to a receiver in a debenture-holder's action, except in the cases where provision for such withdrawal is made, either expressly or by necessary implication in

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the strictest sense, in the Acts themselves. Convenience or saving of expense is therefore no ground for making such an order; and it makes no difference that the company is being wound up.

Semble, there is jurisdiction to make an order for delivery out (e.g.) to a purchaser from a receiver duly appointed under the Acts. *Somerset v. Land Securities Co.*

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Stock and Debentures—Issue by Railway Company at a Discount—Purchase by Company. See RAILWAY

231

(7.) *Debenture-holders, Action by—Receiver—Power to Borrow to preserve Property—Emergency—First Charge—Sanction of Court—R. S. C., 1883, Order XVI. r. 9.*

In a case of emergency, and when it is essential for the preservation of the property of a company, the Court has jurisdiction to authorize the receiver appointed in a debenture-holder's action to raise money as a first charge on the assets, in priority to the debenture-holders. *Greenwood v. Algeciras (Gibraltar) Railway*

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(8.) *Capital—Depreciation—Payment of Dividend.*

In the absence of some special article or contract to the contrary, a limited company which has lost part of its fixed capital by depreciation can lawfully declare or pay a dividend without first making good the capital which has been lost. *Verner v. General and Commercial Investment Trust*

170

(9.) *Shares—Signature of Memorandum of Association by Member of a Firm in his own Name—Subsequent Application in Firm Name for same Number of Shares—Intention of Parties.*

Where a member of a firm signs the memorandum of association of a company in his own name for a certain number of shares, and afterwards applies in the firm name for the same number, it is in each case a question of fact whether there are two contracts to take shares or only one; and if it is shown that according to the intention of the parties there was only one contract, and that a contract by or on behalf of the firm, the individual signatory to the memorandum cannot be placed on the list of contributories in respect of a separate application by him. *In re Glory Paper Mills Co., Dunster's Case*

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Shares—Surplus over amount paid up. See TENANT FOR LIFE AND REMAINDERMAN

290

(10.) *Winding up—Debenture-holders' Action—Receiver—Exceptional Assets—Realization.*

After the presentation of a petition by a creditor to wind up a company, an action was commenced by debenture-holders to enforce their security, and a winding-up order was made. The assets of the company pledged to the debenture-holders were of an exceptional character, and could not be easily and conveniently realized by a mere official of the Court, but required a person in touch with the financial world with a special knowledge of the securities to deal with them satisfactorily:

The Court appointed a receiver on behalf of the debenture-holders in respect of these particular securities, leaving the official receiver in the winding-up to be receiver of all the rest of the assets. *Industrial and General Trust v. South American and Mexican Co.*

64

(11.) — *Voluntary Winding up—Surplus Assets—Distribution—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 133.*

A provision in articles of association that if the company should be wound up, and the surplus assets should be insufficient to repay the whole of the paid-up capital, such surplus assets should be applied

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in repaying to the preference shareholders *pro ratâ* the amount of capital paid on the preference shares held by them respectively at the commencement of the winding-up, so far as such surplus assets should extend, and that the balance of such surplus assets (if any) should be distributed amongst the ordinary shareholders, does not exclude the general rule established by *Birch v. Cropper*, *In re Bridge-water Navigation Co.* (see p. 639), and previous authorities, that the surplus assets of a company are divisible among all the shareholders in proportion to their nominal interest in the subscribed capital of the company. *In re Sheppard's Corn Malting Co. Lowenfeld's case* .

337

Winding up—Scheme of Arrangement—Leave to Appeal from Order. See APPEAL (1) .

217

(12.) — *List of Contributories—Director's Qualification Shares—Implied Contract to take Shares.*

Where a person has accepted the office of a director of a company there ought to be inferred an agreement on his part with the company that he will serve the company on the terms as to qualification and otherwise contained in the articles of association.

The articles of association named R. as one of the first directors, fixed the number of shares to be held as a qualification, and provided that the first directors should have power to act before acquiring this qualification, but in the event of their not acquiring it within one month of their appointment they should be deemed to have agreed to take the same, and the same should be allotted to them accordingly.

R.'s name appeared on the prospectus as a director, and he signed the articles, not as a signatory, but to show his assent to them. He never acted as director nor applied for any shares, nor were any ever allotted to him, and he was never registered as a member of the company:—

Held, that R. had agreed to become a director on the terms of the articles and must be settled on the list of contributories in respect of his qualification shares.

Isaacs' case (see p. 640) followed. *In re Hercynia Copper Co. (Limited)*, *Richardson's case* .

214

(13.) — *Contributories—Founders' Shares—Agreement to take as fully paid up—Acceptance—Retention of Certificates—No contract registered and no entry of Names in Register of Company—Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 23, 74—Companies Act, 1867 (30 & 31 Vict. c. 131), s. 25.*

Founders' shares in a company were offered to certain persons as fully paid on their consenting to push the sale of certain goods the company proposed to sell. No contract in respect of the issue of these shares was registered under section 25 of the Companies Act, 1867. The certificates which did not state that the shares were fully paid were forwarded to and their receipt was duly acknowledged by the recipients, but a letter was sent about the same time by the company stating that the shares were fully paid. The certificates were retained by the recipients until the company requested that they should be returned on the ground of a mistake in allotment; this request was complied with. None of the recipients were entered on the register of shareholders. On the company being afterwards wound up:—

Held, that the names of the recipients must be removed from the list of contributories on the ground that they had only agreed to take fully paid-up shares, and that no contract to take other than fully paid-up shares could arise from the retention of the certificates. *In re Macdonald, Sons & Co. (Limited)* .

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CONTRACT—

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(1.) *Sale of Goodwill—Agreement “not to carry on or be in anywise interested in” business of Grocer—Similar Business set up by Vendor’s Wife—Separate Estate—Injunction.*

On the sale of a grocery business the vendor agreed “not to carry on or to be in anywise interested in” the business of a grocer within five miles from the old shop for a period of ten years. Six or seven years afterwards the vendor’s wife, out of her own separate money, set up in her own name—i.e. in the name of her husband, with the prefix “Mrs.”—a grocer’s shop close to the place where her husband had formerly carried on business, and was assisted by her nephew. The vendor helped his wife to get a lease of the shop; he introduced her to a local bank, where she opened an account in her christian and sur-name, and he introduced the nephew to certain wholesale provision merchants who had supplied him in his business, and induced them to give the nephew credit; he assisted in the preparation of a circular inviting old friends and customers to deal at his wife’s shop, and distributed this circular among various friends. He had not, however, any pecuniary interest in the business, and did not otherwise than as above stated concern himself in it.

Held (dissentiente KAY, L.J.), that the vendor did not carry on, and was not interested in, his wife’s business within the agreement.
Smith v. Hancock 200

(2.) *Restraint of Trade—“Similar”—Restaurant.*

The business of one restaurant-keeper may be “similar,” within the meaning of a restrictive covenant, to that carried on by another, though the establishment of the latter is a fully licensed public-house and the former has no licence of any sort. *Drew v. Guy* 220

COPYRIGHT—

(1.) *Infringement—Painting—Tableaux Vivants—Copyright (Works of Art) Act, 1862 (25 & 26 Vict. c. 68), s. 1.*

To constitute an infringement of the copyright of a painting under section 1 of the Copyright Act, 1862, the reproduction must be something which is itself in the nature of a picture, and accordingly a *tableau vivant* after a painting, so far as it consists of a merely temporary arrangement of living figures, is not a reproduction of the painting or the design thereof within the prohibition of the section. *Hanfstaengl v. Empire Palace (No. 1)* 375

(2.) — *Painting—Tableau Vivant—Rough Sketch in Newspaper—Copyright (Works of Art) Act, 1862 (25 & 26 Vict. c. 68), ss. 1, 2—International Copyright Act, 1886 (49 & 50 Vict. c. 33), s. 2, subs. 3—Berne Convention—Order in Council, 28 November, 1887.*

A sketch in a daily illustrated newspaper of a *tableau vivant* representing a picture may, though the *tableau* does not, constitute an infringement of the copyright of the picture, within the meaning of section 1 of the Copyright (Works of Art) Act, 1862; but whether it does or does not is a question of fact, and depends upon whether or not the sketch can fairly and reasonably, and as it would be judged by a jury, be considered a copy or reproduction of the picture or of the design thereof. *Hanfstaengl v. Empire Palace (No. 2)* 385

(3.) *Book—Map, Chart or Plan—Sleeve Chart—Literary Merit—Originality—5 & 6 Vict. c. 45, ss. 1, 2.*

A sleeve chart, which consists of a piece of cardboard in the shape of a sleeve with certain curved lines and figures printed upon it, is not the subject of copyright under 5 & 6 Vict. c. 45. *Hollinrake v. Truswell* 568

CORPORATION—

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Restrictive Covenant—Enforcement against Municipal Corporation.
See VENDOR AND PURCHASER (4) 609

COSTS—

Payment of Money out of Court—No provision in Special Act as to Costs—Discretion—R. S. C., 1883, Order LXV. r. 1—Supreme Court of Judicature Act, 1890 (53 & 54 Vict. c. 44), s. 5.

Section 5 of the Judicature Act, 1890, confers a jurisdiction which did not previously exist, and gives the Court a discretion as to the costs of payment out of Court of money in a case where the special Act, under which the money is paid in, is silent as to them.

In re Mills' Estate (see p. 640) superseded. *In re Fisher (deceased).* 97

Action for Dissolution of Partnership. *See PARTNERSHIP (3)* . 420

Liability of Married Woman. *See HUSBAND AND WIFE (2), (3).*

Solicitor. *See SETTLED LAND (3), SOLICITOR.*

COVENANTS. *See VENDOR AND PURCHASER (3), (4).*

In Restraint of Trade. *See CONTRACT.*

DAMAGES—Assessment of. *See PRACTICE (4)* 84

DEBENTURES. *See COMPANY (5), (6), RAILWAY.*

DEED—

Conveyance—Land adjoining Highway—Presumption of Law—Rebuttal by Circumstances.

Where a deed of conveyance of land contiguous to a highway described the parcels, giving the acreage to the thousandth part of an acre, by reference to an Ordnance map and to a schedule and plan drawn on the conveyance, the measurements and corresponding numbers and colouring of which did not include any portion of the highway, and further contained a recital that the trees on the land to be sold had been valued and the amount of the valuation—which in fact did not include any of the trees upon the highway—formed part of the purchase-money:—

Held, that the presumption of law that a moiety of the highway passed by the conveyance was rebutted.

Berridge v. Ward (see p. 639) distinguished. *Pryor v. Petre* . . 424

Power of Appointment by Deed. *See POWER* 414

DEFAMATION—

Libel—Slander of Title—False and Disparaging Statement—Damage—Injunction.

A retailer of goods must not attach to goods, when sold by him, false and disparaging statements in commendation of rival goods of his own make. Such conduct may be restrained by injunction on proof that the statement is false, disparaging, and calculated to damage the manufacturer. *Mellin v. White* 354

DIRECTOR. *See COMPANY (1) to (4).*

DISCOVERY—

(1.) *Inspection—Postponement of Inspection—Question of Law to be Determined—R. S. C., 1883, Order XXV. r. 2; Order XXXI. r. 20.*

The Court has jurisdiction under Order XXV. r. 2, to make an order for an action to be set down for the determination of certain points of law, and can postpone inspection of documents under an order obtained therefor until after such points have been determined.

Semble, that Order XXXI. r. 20, is not to be construed so

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narrowly as to mean that the right to discovery or inspection is determined by the making of the common order, or that the Court is by the order for discovery or inspection made in the common form rendered powerless to make a subsequent order for questions of law to be determined before inspection. *De Carteret v. Land Securities Co.* 16

(2.) *Interrogatories—Allowance of Interrogatories by Judge—Right to enter in Affidavit in answer—Appeal—R. S. C., Nov. 1893, Order XXXI. r. 2—R.S.C., 1883, Order XXXI. r. 6.*

Semble, one co-executor's answer to interrogatories cannot be used as an admission against his co-executor.

Although a Judge has, under R. S. C., 1893, Order XXXI. r. 2, gone through proposed interrogatories and struck out parts of them, and given leave to deliver them as amended, the party interrogated may, as provided by R. S. C. 1883, Order XXXI. r. 6, take by his affidavit in answer any proper objection he may have to answering them.

The allowance of such amended interrogatories is a matter in the Judge's discretion, and an appeal against it will not succeed unless a strong case of error in principle or of substantial injustice can be made out. *Peek v. Ray* 259

DIVIDENDS. See COMPANY (8) 170

EASEMENT. See VENDOR AND PURCHASER (5), WATER (2).

ECCLESIASTICAL LAW—

Burial Ground—Building on Unused Portion—“Set apart for interments”—Metropolitan Open Spaces Act, 1881 (44 & 45 Vict. c. 34), s. 1—Open Spaces Act, 1887 (50 & 51 Vict. c. 32), s. 4—Disused Burial Grounds Act, 1884 (47 & 48 Vict. c. 72), s. 3.

A piece of land which, in 1842, had been conveyed to a burial company and enclosed and used by them as a cemetery, was in 1878, by Order in Council, closed. In 1885 a portion of the land, in which no interments had ever been made, was cut off from the rest of the cemetery by a wall. In 1890, by another Order in Council, the cemetery was closed with the exception of the unused portion. A contract had been entered into for the sale of this portion for building purposes. On a vendor and purchaser summons the Court of Appeal held (affirming NORTH, J.) that the cemetery must be looked at as a whole, and that the unused portion had been “set apart for the purposes of interments,” and was a “disused burial ground” within the Metropolitan Open Spaces Act, 1881, and the Open Spaces Act, 1887, s. 4, and that consequently by section 3 of the Disused Burial Grounds Act, 1884, no building could be erected on the same.

A “disused burial ground” now, therefore, means a piece of ground set apart for interments, in which interments have or have not taken place, whether it has been partially or wholly closed under any statute or Order in Council, or has become otherwise disused. *In re Ponsford and Newport District School Board* 622

EVIDENCE—

Presumption—Land adjoining Highway. See DEED 424

EXECUTION—

Equitable Execution—Receiver—Rents and Profits of Land—Earnings of Business—R. S. C., 1883, Order L. r. 15A.

Although a judgment creditor is entitled to have a receiver appointed, by way of equitable execution, of land in which the

EXECUTION—continued.

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judgment debtor has only an equitable interest, he is not entitled to take through such receiver the earnings of a business carried on by the judgment debtor upon the land. *Cadogan v. Lyric Theatre.*

594

Sequestration—Receiver. See **HUSBAND AND WIFE** (3)

400

EXECUTOR—

Trustee—Misappropriation—Liability of Co-trustee.

Two executors and trustees who, *bona fide* and without reason for suspicion, act according to the usual course of business, and put it into the power of a third (whom they properly employ as a stock-broker in the trust) to unregister certain bonds which he then misappropriates, are not liable for his defalcations. *In re Gasquoine (deceased), Gasquoine v. Gasquoine*

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Answer to Interrogatories—Admission. See **DISCOVERY** (2)

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Money “in the hands of” Executors—Payment into Court. See **PRACTICE** (3)

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GOODWILL—

Sale of—Setting up similar business by Vendor’s Wife. See **CONTRACT** (1)

200

HEALTH. See **WATER** (1)

51

HIGHWAY—Presumption as to Ownership of Land adjoining. See **DEED**

424

HUSBAND AND WIFE—

(1.) *Married Woman—Reversionary Interest in Personality—Will executed before, Codicil executed after, 31 December, 1857—Malins’ Act (20 & 21 Vict. c. 57).*

A reversionary interest in personalty was bequeathed to A. by a will made in 1856. The testatrix made a codicil in 1864 bequeathing some additional legacies and died in 1866. A. in 1868, whilst under coverture, purported to assign her reversionary interest by deed, which was duly acknowledged:—

Held, that A. was not “entitled under any instrument made after 31 December, 1857,” within the meaning of Malins’ Act, and therefore was not bound by the deed. *In re Elcom, Layborn v. Groves-Wright*

87

(2.) — *Liability for Costs—“Proceedings instituted”—Married Women’s Property Act, 1893 (56 & 57 Vict. c. 63), s. 2.*

Section 2 of the Married Women’s Property Act, 1893, only contemplates the case of a married woman plaintiff. Although unsuccessful, she cannot be made to pay the costs of interlocutory proceedings taken, or appeals brought by her, in an action in which she is defendant. *Hood Barrs v. Cathcart.*

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(3.) *Execution—Sequestration—Restraint on Anticipation—Married Women’s Property Act, 1882 (45 & 46 Vict. c. 75), s. 19—Married Women’s Property Act, 1893 (56 & 57 Vict. c. 63), s. 2.*

Rents accruing after judgment of property subject to a restraint on anticipation cannot be taken in execution under a writ of sequestration, or by means of a receiver.

Hood Barrs v. Cathcart (see p. 640) followed.

Section 2 of the Married Women’s Property Act, 1893, which enables the Court in certain circumstances to order and enforce payment of costs out of property subject to a restraint on anticipation, does not give jurisdiction to alter or vary an order for payment of costs made before the Act came into operation, or to make a new

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order for payment of the same costs. *In re Lumley, Hood Barrs v. Cathcart* 400

(4.) *Marriage Settlement—Construction—Trust for Wife for Life and afterwards for Husband until his Bankruptcy, &c., or Death—Limitation over to Children "after the decease of the survivor."*

Certain interests to which a wife was entitled were, upon her marriage, settled upon trust for her for life, and after her death the income was directed to be paid to the husband until he should become bankrupt or should alienate the same, or until his death, which should first happen. "After the decease of the survivor" the trust funds were to be held in trust for the children of the marriage. In February, 1883, the husband filed his petition in bankruptcy, and resolutions for liquidation by arrangement were subsequently passed by his creditors. In March, 1893, the wife died:—

Held, that the words "after the decease of the survivor," etc., must be construed as "after the determination of the interests herein-before given;" and that, therefore, the children became entitled to the income of the trust funds as if the husband were dead.

In re Tredwell, Jeffray v. Tredwell (see p. 641) distinguished. *In re Akeroyd's Settlement, Roberts v. Akeroyd* 405

Maintenance of Lunatic's Wife. See LUNATIC (1) 255

INFANT—

Maintenance—Vested and Contingent Interests—Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 43.

Where under a will members of a class who are infants are entitled to shares in certain property contingently upon attaining twenty-one, those members of the class who by attaining that age have acquired a vested interest, take (as between them and the infant members of the class) a vested interest in only aliquot shares of the capital corresponding to the total number of members of the class; and are entitled only to shares of the income corresponding to their respective vested shares in the capital. Maintenance can, therefore, under section 43 of the Conveyancing Act, 1881, be allowed to the infant members of the class out of the shares of income to which such infants respectively are contingently entitled.

In re Burton's Will, Banks v. Heaven (see p. 639), approved; *In re Jeffery, Burt v. Arnold* (see p. 640), approved in *In re Adams, Adams v. Adams* (see p. 639), overruled. *In re Holford, Holford v. Holford* 304

INJUNCTION—

Damages—Jurisdiction—Discretion—Lord Cairns' Act (21 & 22 Vict. c. 27), s. 2—Ancient Lights—Obstruction.

Where the plaintiff's ancient lights have been obstructed to a substantial extent by a new building, and will be still further obstructed by the carrying out of the building scheme, the plaintiff *prima facie* is entitled to an injunction to restrain such further obstruction, the Court having no discretion to award damages in lieu thereof. The Court awarded damages in respect of the obstruction caused by the part of the building already erected.

Dreyfus v. Peruvian Guano Co. (see p. 640), and *Holland v. Worley* (see p. 640) discussed. *Martin v. Price* 90

Interlocutory—Libel—Slander of Title. See DEFAMATION . . . 354

Motion by Plaintiff for Injunction before Statement of Claim delivered. See PRACTICE (1) 358

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LIMITATIONS, STATUTE OF—

Mortgage of Bonds—Special Authority to Sell—Undertaking to pay any Deficiency on Realization—Sale—New Obligation—Cause of Action—21 Jac. 1, c. 16, s. 3.

Where on a loan bonds are mortgaged by way of collateral security for repayment on a fixed day, and the mortgagee is authorized in the event of the loan remaining unpaid after it becomes due to realize the securities, an undertaking in the same instrument by the mortgagor to pay any difference between the net proceeds of the securities and the amount due does not create a new and independent obligation so as to postpone the operation of the Statute of Limitations until such realization, but the Statute begins to run as from the date fixed for repayment of the loan. *In re McHenry, McDermott v. Boyd, Ex parte Barker.* 527

Proof for Debt barred—Scotch Judgment registered in England. See ADMINISTRATION ACTION 346

Breach of Trust—Directors. See COMPANY (4) 115

LIS PENDENS—

How far applicable to Chattels.

The doctrine of *lis pendens* does not apply to personal property, except leaseholds, and possibly money in Court. *Wigram v. Buckley* 469

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LUNATIC—

(1.) *Maintenance — Judgment Creditor — Execution — Receiver in Lunacy—Maintenance of Lunatic's Wife—Lunacy Act, 1890 (53 Vict. c. 5), ss. 116, 117.*

In sanctioning a scheme for the maintenance of a lunatic under sections 116 and 117 of the Lunacy Act, 1890, the Lords Justices will not allow the lunatic's wife maintenance out of his property as against his creditors.

An action was brought against a person of unsound mind not so found and judgment was on 16 March, 1894, obtained. On 17 March the judgment creditor lodged a writ of *fi. fa.* with the sheriff, and he, on the morning of 19 March, executed the writ and seized the lunatic's goods. The lunatic's wife, on the afternoon of the same day, obtained an order appointing her interim receiver pending the hearing of a summons in lunacy, which had been taken out by her on 12 March, asking for leave to sell the lunatic's property and to retain out of the proceeds of sale a certain sum weekly for the maintenance of herself and the lunatic. The sheriff thereupon gave up possession of the goods to the wife. On the hearing of the summons the scheme for maintenance was approved of by the Master in Lunacy. The Lords Justices confirmed the scheme so far as the maintenance of the lunatic was concerned, but refused to include the maintenance of the wife in the scheme, and made the order without prejudice to any priority or charge the executors might have acquired by lodging the writ of *fi. fa.* with the sheriff. *In re Winkle.* 255

LUNATIC—continued.

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(2.) *Settlement—Tenant for Life incapable of Managing his Affairs—Person appointed to act on his Behalf—Jurisdiction to authorize Sale of Mansion-house—Lunacy Act, 1890 (53 Vict. c. 5), ss. 116, 120, 128.*

Where a tenant for life under a settlement which contained a general power of sale of all or any of the settled hereditaments has become through mental infirmity incapable of managing his affairs, and a person has been appointed to manage the property and to exercise the powers vested in the tenant for life by statute or under the settlement of granting leases, the Court has jurisdiction, under sections 120 and 128 of the Lunacy Act, 1890, to authorize the person so appointed to act on behalf of the tenant for life to exercise the power of sale in reference to the mansion-house. *In re X*. 365

(3.) *Practice—Person incapable of Managing his Affairs—Mental Infirmity arising from Age—Master—Order—Receiver of Dividends only—Securities not transferred into Court—Jurisdiction—Lunacy Act, 1890 (53 Vict. c. 5), ss. 108, 116, subs. 1 (d), 2; ss. 120, 133, 137, 146, 333—Lunacy Act, 1891 (54 & 55 Vict. c. 65), s. 27, subs. 4—Rules in Lunacy, 1892.*

Where a person is, through mental infirmity arising from disease or age, incapable of managing his affairs, a master in lunacy has jurisdiction to appoint a receiver of the dividends of government and other securities without ordering a transfer of such securities into the name of the receiver.

Although a Judge has jurisdiction to appoint a receiver of dividends only, the usual practice both in Chancery and Lunacy, namely—to order the securities to be transferred into Court, and to allow the receiver to obtain the dividends from the paymaster-general, ought not without sufficient reason to be departed from, but ought in general to be adhered to. *In re Browne*. 380

MAINTENANCE. See INFANT—LUNATIC (1).

MARRIAGE SETTLEMENT. See HUSBAND AND WIFE (4) 405

MARRIED WOMAN. See HUSBAND AND WIFE.

MORTGAGE—

(1.) *Consolidation—Assignment of Equity of Redemption in one Property—Subsequent Union of Mortgages.*

A transferee of several mortgages made by the same mortgagor to different mortgagees has, as against a person to whom the equity of redemption of one of the mortgages was assigned prior to the union of all the mortgages in one hand, no right of consolidation.

The right of the assignee of the equity of redemption to resist consolidation is not affected by the fact that he is also puisne mortgagee of some or all of the properties comprised in the mortgages.

Vint v. Padget (see p. 641) doubted. *Minter v. Carr*. 558

(2.) *Priority—Mortgage of Book Debts—Notice to Debtors—Receiver in Foreclosure Action—Laches—Subsequent Incumbrancer without Notice—2 & 3 Vict. c. 11, s. 7—30 & 31 Vict. c. 47, s. 2.*

A mortgagee who takes an assignment of property without notice of any defect in his assignor's title acquires a good title notwithstanding that his assignor has in fact been restrained by injunction and the appointment of a receiver from dealing with such property.

Where a mortgagee who has obtained an order appointing a receiver and restraining the mortgagor from dealing with the property comprised in the mortgage takes no further steps, either

MORTGAGE—*continued.*

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by himself or by the receiver, to perfect his security, such neglect constitutes *laches* which will postpone him to a subsequent incumbrancer who has taken without notice of any prior incumbrance, and has used due diligence. *Wigram v. Buckley*. 469

MORTMAIN. See CHARITY.

NOVATION. See PARTNERSHIP (1), (2).

NUISANCE—

Overhanging branches of Trees—Abatement—Notice of Intention to Abate.

The encroachment of boughs and roots over and within the land of an adjoining owner is a nuisance, and not a trespass upon or occupation of that land which by lapse of time could become a right.

Where branches of trees, of whatever age, growing upon the land of one owner, overhang the land of another owner, the owner of the land encroached upon may without notice, provided he does it without entering upon his neighbour's land, cut so much of the overhanging branches as encroaches upon his own land. *Lemmon v. Webb*. 275

PARTNERSHIP—

(1.) *Retirement of one Partner—Discharge of Debts by continuing Partners—Novation—Principal and Surety—Giving Time to Principal Debtors—Discharge of Surety.*

An intention to look to some or one of several debtors for payment does not of itself show a novation whereby the others or other are released.

A firm was indebted to its bankers for an overdraft, and the partners were jointly as well as separately liable for the debt. The bank was entitled to a lien on the shares of any of its members who were indebted to it. A member of the firm was a shareholder in the bank. The partnership having expired one partner retired, the debt to the bank being still in existence. The business was carried on by the other partners, but no new partner was introduced. On the retirement a deed of dissolution was executed by the retiring and the continuing partners. This deed provided for the carrying on of the business by the other partners, and for the retiring partner's capital being retained in the business. It also contained a release and assignment of his share and interest in the assets to his co-partners, and a covenant by him to confirm whatever they might do in the way of dealing with or realizing the assets, and a covenant by the continuing partners with the retiring one to pay the debts with all convenient speed, and to indemnify him against the partnership debts and liabilities, but he was not to be entitled to require payment of any of those debts so long as he was so indemnified.

The bank was aware of the substance and general effect of this deed when at a subsequent time it agreed (i.) to allow an increased overdraft to the new firm, for whom it had opened a new account in its books, such increased overdraft to include the old overdraft; (ii.) not to enforce payment of this increased overdraft for a specified time. The partner who had retired was not consulted in the matter of this overdraft, nor did the bank reserve its rights against him. When he claimed his dividends on his shares in the bank, the latter asserted its lien thereon in respect of the old overdraft:—

Held, that there had not been any novation, and that the bank had not agreed to discharge the retiring partner, and to look to the new firm alone for payment.

PARTNERSHIP—*continued.*

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But (KAY, L.J., dissenting) that the bank's lien still existed on the ground that the deed of dissolution itself empowered the continuing partners to enter into the agreement by which the bank gave them time to pay the increased overdraft.

Semble, per LINDLEY and KAY, L.JJ.: *Oakeley v. Pasheller* (see p. 640), taken together with decisions following it, laid down that where co-debtors become as between themselves principal and surety, and the creditor is informed of it, the rules as to dealing with a principal debtor to the surety's prejudice are applicable whether the creditor assented to the new arrangement or not. *Swire v. Redman* (see p. 640) commented on. *Rouse v. Bradford Banking Co.* 127

(2.) *Novation—Banker and Customer—Transfer from Current to Deposit Account—Deceased Partner's Estate.*

The transfer of a sum of money after the death of a partner in a bank from a current to a deposit account is a novation so as to discharge the estate of the deceased partner from liability to the customer. *In re Head, Head v. Head* 167

(3.) *Action for Dissolution—Costs—Capital Withdrawn—Priority.*

Where, in the administration of partnership assets, it is found that the assets are insufficient, a partner who has withdrawn more than his proportionate share of the capital must make good such excess in fact or in account before payment of the costs of the action. *Ross v. White* 420

PAYMENT INTO COURT. See PRACTICE (2), (3).

PERPETUITY. See WILL (2) 495

POWER—

Appointment by Deed—Construction—Survivorship—Revocation.

Under a trust in a marriage settlement for the children of the marriage as the husband and wife shall by deed with or without power of revocation and new appointment jointly appoint, and in default of and subject to any such joint appointment as the survivor shall by deed with or without power of revocation and new appointment or by will appoint, a joint appointment expressed to be made subject to the power of revocation and new appointment mentioned in the settlement may be revoked by the survivor and a new appointment made.

Brudenell v. Elwes (see p. 639) and *Dixon v. Pyner* (see p. 640) followed. *In re Harding, Rogers v. Harding* 414

PRACTICE—

Appeal. See APPEAL.

Arbitration. See ARBITRATION 243

Costs. See COSTS.

Discovery. See DISCOVERY.

(1.) *Motion by Plaintiff for Injunction before Statement of Claim delivered—Cross-motion by Defendant—Judicature Act, 1873, s. 24, subs. 7—Rules of the Supreme Court, 1883, Order L. r. 6.*

A defendant who has appeared cannot, where no statement of claim has been delivered, move for an interlocutory injunction where the relief which he seeks is not incidental to or does not relate to or arise out of the relief sought by the plaintiff's action; but he must either wait till he can put in a counter-claim or issue a writ in a cross-action.

PRACTICE—*continued*.

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Relief against breach by the plaintiff of a covenant not to use the defendant's name in carrying on a business which had formed the subject of partnership between the plaintiff and the defendant is not incidental to relief sought in an action by the plaintiff for breach by the defendant of a covenant not to carry on a like business within a certain radius, though both covenants are contained in the deed of dissolution of partnership.

Sargant v. Read (see p. 640) distinguished. *Carter v. Fey* . . . 358

(2.) *Payment into Court—Admission.*

On an application for an order for payment of money into Court, the Court will not extend the doctrine of admissions that the defendant has the money in his hands further than it was carried in *Freeman v. Cox* (see p. 640), where an affidavit of the plaintiff charging that the defendant had the money in his hands, not answered by the defendant, was held sufficient to justify an order.

Neville v. Matthewman 511

(3.) *Payment into Court—Money "in the hands" of Executors or Trustees—Money parted with before Application—Rules of the Palatine Court, Order XLVIII. r. 3 (d)—R. S. C., 1883, Order LV. r. 3 (d).*

Although trustees or executors are proved to have received trust money, and have not properly discharged themselves thereof, an order for payment of the money into Court cannot be made upon them under R. S. C., 1883, Order LV. r. 3 (d) (or Order XLVIII. r. 3 (d) of the Palatine Rules, which is in the same terms), unless when the application is made the money is actually in their hands.

In re Chapman, Fardell v. Chapman (see p. 640), disapproved. *Nutter v. Holland* 491

(4.) *Assessment of Damages—"Continuing Cause of Action"—R. S. C. 83, Order XXXVI. r. 58.*

At the trial of an action to restrain a nuisance, an injunction was granted and an inquiry directed as to damages; the chief clerk assessed the damages down to the date of his certificate, the nuisance not having in the meanwhile been abated:—

Held, that the principle of assessment was correct, the repetition of the nuisance since the trial being a "continuing cause of action" within Order XXXVI. r. 58. *Hole v. Chard Union* 84

(5.) *Taxed Costs—Solicitor—Four-day Order—Sequestration—Rules of the Supreme Court, 1883, Order XLIII. r. 7.*

The effect of Order XLIII. r. 7 is to alter the old Chancery common practice under which payment of costs, where no time was fixed, was enforced by subpoena, upon proof of service of which and of non-payment a writ of sequestration might issue as of course, and to substitute for the subpoena the leave of the Court or a Judge to issue a writ of sequestration, no four-day order being necessary.

In re Lumley 179

PRESUMPTION. See DEED 424

PRINCIPAL AND AGENT—

Liability of Principal for Fraud of Agent. See TRUSTER (2) . . . 100

PRINCIPAL AND SURETY—(1.) *Co-Sureties—Contribution.*

F. E. & B. entered into a joint and several bond to secure the repayment of a sum lent to F., and it was stipulated that if E. or

PRINCIPAL AND SURETY—*continued.*

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B. should die, F. should within a month procure some other person to enter into a further bond to the like effect. E. died and a fresh bond was executed by F. B. & H. in the same form as the former bond with the additional proviso that it should not release the heirs, executors, or administrators of E., or in any way alter, vary, or lessen their liability, or affect any right or remedy of the lender under the former bond. B. & H. having paid the debt in equal shares claimed against E.'s estate for half the amount:—

Held, that E.'s estate was liable for one-third only of the amount paid by B. & H. *In re Ennis, Coles v. Peyton* 544

(2.) *Payment by one Co-surety—Right of Proof against other Co-sureties—Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 5.*

Where one of several co-sureties has paid off the debt, he is, notwithstanding the terms of section 5 of the Mercantile Law Amendment Act, 1856, entitled to the benefit of a proof by the creditor against one of the co-sureties for the full amount of the debt, and his right of proof is not (though his right of receiving dividends is) limited to the sum which as between him and his co-surety such co-surety is liable to pay.

Ex parte Stokes (see p. 640) followed.

Per DAVEY, L.J.: Whether the result would be the same if the creditor had never proved, and the surety who had paid the debt had in the first instance claimed against his co-surety, *quære*. *In re Parker, Morgan v. Hill* 590

Discharge of Surety—Giving Time to Principal Debtor. See PARTNERSHIP (1) 127

RAILWAY—

Powers—Capital—Issuing Stock at a Discount—Issuing Debentures at a Discount—Agreement to Purchase its own Stock—Validity—Executory and Executed Contract—Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16).

A company governed by the provisions of the Companies Clauses Act, 1845, and amending Acts, may issue its stock as fully paid up at a price less than the nominal value, if the transaction is not in fact improvident.

The principle of *Campbell's case* (see p. 640) is applicable to such a company, which may, therefore, issue debentures at a price less than the nominal value, if the transaction is not in fact improvident. *Webb v. Shropshire Railways Co., Whadcoat v. Same* 231

RECEIVER—

Debenture-holders' Action. See COMPANY (7) 620

Equitable Execution—Earnings of Business. See EXECUTION. 594

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REVENUE—

Annuity Free of Income-tax. See WILL (3) 72

RULES AND ORDERS—

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Rules of the Palatine Court, Order XLVIII. r. 3 (d) 491

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SETTLED LAND—

(1.) "*Settled Estate*"—*Sale of Portion—Application of Proceeds in Extinguishment of Incumbrances on other Portion—Failure of Contingent Remainders—Settled Land Act, 1882 (45 & 46 Vict. c. 38), ss. 2, 21, 22, subs. 5.*

A testator by will devised his W. estate, his S. estate, and his R. estate to A. for life, with remainder to such of his children as should attain twenty-one. At the date of the testator's death the R. estate and part of the W. estate were mortgaged. A., as tenant for life, sold a portion of the S. estate, and the proceeds were applied towards the discharge of the incumbrances on the W. and R. estates. In the events which happened the contingent remainders failed as to the S. estate and the unincumbered portion of the W. estate:—

Held, that, though owing to the failure of the contingent remainders the three estates did not, in the event, devolve in the same way, yet they constituted only one settled estate under one settlement; and that, accordingly, the proceeds of sale of the portion of the S. estate were properly applied in discharge of the incumbrances on the W. and R. estates. *In re Freme, Freme v. Logan* 1

(2.) *Mansion-house—Rebuilding—Letting—Other Buildings—Chapel—Agent's House—"One half of the annual income"—Settled Land Act, 1882 (45 & 46 Vict. c. 38), ss. 21 (iii.) (vii.), 25—Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 13 (ii.) (iv.).*

The decisions on the Lands Clauses Act, 1845, that the purchase-money of settled lands, which ought by that Act to be reinvested in freehold lands, may be applied in building upon other parts of lands in settlement, have no application in the case of capital moneys under the Settled Land Acts. These statutes form a code, and capital moneys can only be applied as the statutes direct.

Whether a building forms part of the principal mansion-house is a question of fact in each case.

A "rebuilding" of the principal mansion-house under the Acts is to be understood in connexion with the structure, and does not include mere architectural embellishment.

Capital moneys cannot be applied in building a chapel or a house for the agent to the estate.

In re Houghton Estate (see p. 640) observed upon.

Section 13 (ii.) of the Act of 1890 only applies where the expenditure is to be made in view of an immediate or prospective letting.

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In re De Teissier's Settled Estate (see p. 640) approved.

In ascertaining the half of the annual rental of the settled land for the purposes of section 13 (iv.), the rental of the whole of the land in settlement must be taken into account. *In re Lord Gerard's Settled Estates* 227

(3.) *Sale—Several Persons constituting one Tenant for Life—Separate Solicitors—Costs—Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 2, subs. 6; s. 53—General Order made in pursuance of the Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44), Sch. I. Pt. 1.*

Where several persons entitled as tenants in common together constitute a tenant for life for the purposes of the Settled Land Act, 1882, they need not, on a sale of the settled land, employ a common solicitor to carry out the sale; and costs of separate solicitors for perusing and completing the conveyance will be allowed out of the proceeds. *In re Smith, Smith v. Lancaster* 465

— *Sale—Tenant for Life incapable of managing his affairs. See LUNATIC (2)* 365

(4.) *Lease by Tenant for Life—"Building lease"—Covenant by Lessee to spend a specified Sum in doing scheduled Repairs—Discretion of Court—Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 2, subs. 10 (iii), ss. 6, 8 (i), 63—Settled Land Act, 1884 (47 & 48 Vict. c. 18), s. 7 (i).*

Semble, a lease by which the lessee covenants to expend a fixed sum in doing repairs specified in a schedule to the lease is a "building lease" within the meaning of section 2, subsection 10 (iii) and section 8 (i) of the Settled Land Act, 1882, and the Court has therefore jurisdiction under section 7 (i) of the Settled Land Act, 1884, to give leave to a person who by virtue of section 63 of the Settled Land Act, 1882, is tenant for life of settled property, to grant such a lease for any term not exceeding ninety-nine years. The giving of such leave is, however, in each case a matter in the discretion of the Court. *In re Daniell's Settled Estates* 462

SHARES. See COMPANY.

SLANDER OF TITLE. See DEFAMATION 354

SOLICITOR—

(1.) *Bill of Costs—Taxation—Agency Charges—Firms of Solicitors having Common Members—R. S. C., 1883, Appendix N., Costs, r. 119.*

Agency charges for work done by a London firm of solicitors as agents for a country firm—two partners out of three in each firm being the same—were disallowed on taxation:—

Held, that it having been the practice of the Chancery taxing-masters for forty or fifty years not to treat cases of two firms having certain partners in common as agency cases at all, the Court could not overrule the practice, and the charges were properly disallowed. *In re Borough Commercial and Building Society* 75

(2.) *Costs—Taxation—Separate Retainers—Solicitors Act, 1843 (6 & 7 Vict. c. 43), s. 37.*

Where a solicitor is retained separately by a number of persons to take proceedings on behalf of all, each is entitled to have the whole bill of costs taxed, although each such person has only to pay a proportion of the entire amount, without serving any person except the solicitor; but the Court will endeavour to secure a taxation at which all the parties interested are present in order to avoid any subsequent application to tax. *In re Salaman* 540

Taxed Costs—Sequestration—Four-day Order. See PRACTICE (5) 179

SOLICITOR—continued.

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(3.) *Sale by Auction—Scale Fee, when Applicable—Auctioneer merely taking the Bids—“Auctioneers’ charges” and “Commission”—General Order of 1882 under Solicitors’ Remuneration Act, 1881 (44 & 45 Vict. c. 44), s. 4, and Schedule I., Part I., Rule 11.*

Where, in accordance with the usual practice in the North of England, a solicitor does all the work in connection with a sale by auction except taking the bids, and the auctioneer is paid a fixed sum for each lot sold, and a fixed sum for each lot unsold, such payments to the auctioneer constitute a “commission” within Part I. Rule 11 of Schedule I. of the General Order of 1882, and disentitle the solicitor to charge the scale fee allowed by that schedule “for conducting a sale of property by public auction.” *Drielsma v. Manifold*

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Sale—Several Persons constituting one Tenant for Life—Separate Solicitors. See SETTLED LAND (3)

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TENANT FOR LIFE AND REMAINDERMAN—

Capital and Income—Trust of Shares in Trading Concern—Direction that no Part of Income is to be retained as Capital—Liquidation—Sale of Undertaking—Surplus over Amount paid up on Shares.

A direction in a will that all income produced by the testator's estate in its actual condition for the time being shall be applicable as income, no part thereof being in any event liable to be retained as capital, does not entitle a tenant for life of shares in a trading concern, which has been sold, to the surplus which remains after satisfying the amount actually paid up on the shares in the undertaking. *In re Armitage, Armitage v. Garnett* 290

TRADE-MARK—

(1.) *Registration—Essential Particulars—"Somatose"—"Invented word"—"Word having no reference to character or quality of goods"—Patents, Designs, and Trade-marks Act, 1883 (46 & 47 Vict. c. 57), s. 4—Patents, Designs, and Trade-marks Act, 1888 (51 & 52 Vict. c. 50), s. 10, subs. 1 (d), (e).*

Upon the application to register the word "Somatose" as a trade-mark in respect of an article made from meats and called a pharmaceutical product, its object being nourishment of the human body:—

Held (LINDLEY, L.J., dissentiente), that "Somatose" was not an

TRADE-MARK—*continued.*

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"invented word," but that, even if it was an invented word, it was not a "word having no reference to the character or quality of the goods" within section 64 of the Patents, &c. Act, 1883, as amended by section 10 of the Patents, &c. Act, 1888, and consequently could not be registered. *In re Farbenfabriken's Trade-mark* . . . 439

(2.) *Registration—Star—Subsequent Registration of Words "Red Star Brand"—"Calculated to deceive"—Motion to rectify Register—"Person aggrieved"—Delay—Patents, &c., Act, 1883 (46 & 47 Vict. c. 57), ss. 67, 72, subs. 2, 90—Patents, &c., Act, 1888 (51 & 52 Vict. c. 50), ss. 11, 14.*

Inasmuch as the registration of a device as a trade-mark by section 67 of the Patents, &c., Act of 1883, gives the registered owner the exclusive right to use the same in any colour, a mere description in words of the same device, although confined to some particular colour, cannot be subsequently registered by any other person in respect of the same class of goods.

In 1876, B. & Co., who were export merchants in London, and were in the habit of purchasing glass in Belgium and shipping it from this country to the colonies, registered as a trade-mark a star in connexion with their window glass, which became known in the trade as "Star Brand" glass. In 1890 a Belgian company registered in England as a trade-mark for window glass the words "Red Star Brand," having in 1885 registered in Belgium the device of a red star which they had ever since 1880 largely used on cases of glass sent to the United Kingdom. B. & C. having been informed in 1893 that the Belgian company's glass was being sold in New Zealand under the description of "Red Star Brand," learnt for the first time of the registration of the mark in question, and they thereupon moved to have it expunged from the register of trade-marks:—

Held, that B. & Co. were entitled to have the mark "Red Star Brand" expunged on the ground that it was calculated to deceive, and that they were persons aggrieved within section 90 of the Patents, &c., Act, 1883, and that there had been under the circumstances no such delay on their part in applying to the Court as would preclude them from relief. *In re The Trade-Mark of La Société Anonyme des Verreries de l'Étoile* . . . 183

TRESPASS—

By roots and branches of Trees. See NUISANCE . . . 275

TRUSTEE—

(1.) *Breach of Trust—Investment on Mortgage—Insufficient Security—Statute of Limitations—Impounding Interest—Consent of Beneficiary—Trustee Act, 1888 (51 & 52 Vict. c. 59), ss. 6, 8.*

A breach of trust had been committed by trustees in 1878 by investing trust money on mortgage upon property of insufficient value, at which date the cause of action in respect thereof arose:—

Held, that payment of interest to the tenant for life by the trustees, from 1878 to 1890, was not an acknowledgment by the trustees of a liability to repay the principal, and that the action against the trustees by the tenant for life for breach of trust was barred by section 8 of the Trustee Act, 1888.

In order to give a Court power under section 6 of the Trustee Act to impound the interest of a beneficiary by way of indemnity to trustees, the beneficiary must "instigate," "request," or "consent in writing," to some act or omission which is itself to his knowledge a breach of trust, and not to some act or omission which only becomes a breach of trust by reason of want of care on the part of the trustees. *In re Somerset, Somerset v. Poulett (Earl)* . . . 34

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(2.) *Breach of Trust—Fraud of Agent—Liability of Principal—Statute of Limitations—“Party or Privy to” Fraud—Trust Property “still retained” by Trustee—Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 8.*

The fraud of an agent, to make the principal liable, must be committed within the scope of his authority and for the benefit of the principal.

A person who knows nothing of the fraudulent act of another, and in no way ratifies or benefits by it, and has no moral complicity with it, cannot be said to be “party or privy to” it within the meaning of section 8 of the Trustee Act, 1888.

To exclude a trustee from the benefit of that section on the ground that the trust property is “still retained” by him, it must be in his hands or within his control at the date of the writ.

Blair v. Bromley (see p. 639), and *Moore v. Knight* (see p. 640) distinguished. *Thorne v. Heard* 100

Money “in the hands of” Trustees—Payment into Court. See PRACTICE (3) 491

Liability of Directors. See COMPANY (4) 115

— *of Executor for misappropriation of Co-executor. See EXECUTOR* 449

VENDOR AND PURCHASER—

(1.) *Sale of Land—Conditions of Sale—Wilful Default of Vendors—Interest on Purchase-money.*

In a contract for the sale of land one of the conditions was that if from any cause whatever other than the wilful default of the vendors the purchase should not be completed by a certain date, interest should be paid upon the purchase-money by the purchaser. The particulars and conditions of sale stated that the whole of the property had been acquired under a certain Act of Parliament, and was being sold under the powers of such Act, but the sale plan showed that portions of the property had been acquired under a later Act. The misdescription arose through the inadvertence of the vendors to examine the title before the particulars and conditions of sale were framed. The title to the whole of the property sold was not made out or accepted by the purchaser until after the date fixed for completion, and the purchase was not finally completed for some months later. The real cause of the delay was, as a matter of fact, the difficulty of the purchaser in obtaining the purchase-money. In these circumstances, held by LINDLEY and LOPES, L.JJ. (KAY, L.J., dissenting), that the omission to verify the statement as to the title did not amount to wilful default on the part of the vendors within the condition, and that they were entitled to interest on the purchase-money until completion. *In re London (Mayor) and Tubbs* 265

(2.) *Constructive Notice—Successive equitable Incumbrancers—Prior Equities—Purchaser getting in legal Estate after Notice—Tacking—Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 21, subs. 2—Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 3, subs. 1.*

By section 3, subsection 1 of the Conveyancing Act, 1882, “a purchaser shall not be prejudicially affected by notice of any instrument . . . unless . . . it would have come to the knowledge of his solicitor . . . if such inquiries and inspections had been made as ought reasonably to have been made” :—

Held, that the expression “ought reasonably” means ought as a matter of prudence, having regard to what is usually done by prudent men of business in similar circumstances.

Doctrine as to constructive notice in *Ware v. Egmont* (see p. 641) approved.

The doctrine that where equities are equal the legal title prevails

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is not confined to tacking mortgages, but applies in favour of all equitable owners or incumbrancers for value without notice of prior equitable interests, who get in the legal estate from persons who commit no breach of trust in parting with it to them. *Brace v. Marlborough (Duchess)* (see p. 639) followed. *Bailey v. Burnes* . . . 9

(3.) — *Covenants for Title—Defect appearing by Recital in Deed of Conveyance—Vendor's Liability.*

A vendor's covenants for title are to be construed literally and without the importation of any exception not introduced by express words. Consequently, covenants for title which on their literal construction are wide enough to apply to a defect in title disclosed by a recital in the deed of conveyance itself, do in law so operate.

Hunt v. White (see p. 640) overruled. *Page v. Midland Railway* . . . 24

(4.) *Restrictive Covenant—Building Scheme—Municipal Corporation—Disposition of Corporate Land—Approval of Treasury—Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 108, 109.*

Although, in ordinary cases, where the conditions of sale subject to which a sale, whether by auction or by private contract, is made, state that every purchaser shall enter into certain restrictive covenants limiting, for the benefit of the adjoining land, his right of user of the land conveyed to him, such conditions constitute a scheme enforceable by any purchaser against the vendor and any other purchaser with notice; yet, if the vendor be a municipal corporation, sections 108, 109 of the Municipal Corporations Act, 1882, make it necessary that the approval of the Treasury (or, since the Local Government Act, 1888, of the Local Government Board) should be obtained not only to the conveyance to the purchaser, but also to the restrictive covenants on the vendor's part which are to be implied from the conditions. If, therefore, the Treasury has consented only to the conveyance and not to the implied covenants, such covenants cannot be enforced against the corporation, or against other purchasers from them even with notice.

Semble (per KAY, L.J.), to establish that the Treasury have approved of such a scheme, it is not enough to show that, having had constructive notice of it, they have approved the sale; it must appear that they have had full knowledge, and have deliberately signified their approval of the scheme. *Davis v. Leicester Corporation* . . . 609

(5.) *Lands sold reserving Rent—Power of limited Owner to Sell—Easement—Rentcharge—Special Act—Lands Clauses Act, 1845 (8 & 9 Vict. c. 18), ss. 10, 11.*

Wherever land is sold reserving a rent, that rent may, since the statute of 4 Geo. 2, c. 28, properly be called a rentcharge, for there is incident to it a right of distress.

An enactment in a special Act, incorporating the Lands Clauses Act, 1845, that "it shall be lawful for the mayor, &c., to purchase either absolutely for a sum in gross or at an annual or other rent," any lands therein referred to, "or any easement in or over the same," and that "the persons empowered by the Lands Clauses Act, 1845, to convey lands shall have full power to convey or grant in perpetuity at an annual or other rent any lands for the purposes of this Act or the Acts incorporated herewith, or any easement," has the effect of extending section 10 of the Lands Clauses Act so as to give to a limited owner the same power of selling lands for a rentcharge in lieu of a sum in gross as an absolute owner has under that section, and also of enabling him to sell an easement for a rentcharge which will be charged by virtue of section 11 on the rates and tolls payable under the special Act. *In re Lord Gerard and Beecham's Contract* . . . 519

WATER—

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(1.) *Water Supply*—"Street"—*Private Road*—*Local Authority having Control of Streets generally*—*Power to break up Private Road without Owner's Consent*—*Public Health Act, 1875* (38 & 39 Vict. c. 53), ss. 4, 16, 54, 57, 308—*Waterworks Clauses Act, 1847* (10 & 11 Vict. c. 17), ss. 28-34.

A private road is a "street" within the meaning of sections 16 and 54 of the Public Health Act, 1875.

The words "where the local authority have not the control of the streets," in section 57 of the Public Health Act, 1875, are descriptive of and mean a local authority not having the control of the streets generally in its district—i.e. a local authority which is not the road authority.

The defendants, who had the powers of an urban sanitary authority with respect to the W. district, and the control of the streets generally in that district, and also the power of supplying the inhabitants with water, proceeded, without the plaintiff's consent, to break up a private road belonging to the plaintiff, which was situate within their district, for the purpose of laying down water mains:—

Held (A. L. Smith, L.J., dissenting), that section 57 of the Public Health Act, 1875, incorporating section 29 of the Waterworks Clauses Act, 1847, which forbids the laying down of any pipe in any private land without the consent of the owner, did not apply to the defendants, as they were a local authority having the control of the streets generally in their district; that, under sections 16 and 54 of the Public Health Act, 1875, the defendants, as the local authority, had the power to carry the water mains through the plaintiff's private road without his consent; and, consequently, that the plaintiff was not entitled to an injunction. *Hill v. Wallasey Local Board*

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(2.) *Riparian Proprietors*—*Defined Channel*—*Continuous and apparent Easement*—*Diversion of Water*—*Injunction*.

The plaintiff and defendant were owners of lands formerly belonging to the same person. A stream of water had for many years originated in a spinney on the defendant's land, and had flowed down in a defined channel to and through the plaintiff's land into a brook. The conveyance of the plaintiff's land expressly included all easements and watercourses "appertaining to" the land conveyed. An injunction was granted to restrain the defendant from diminishing the flow of water down the stream by abstracting water from the springs that fed the stream, on the ground either that there had been an implied grant to the plaintiff of a continuous and apparent easement, or that he had the right of an ordinary riparian owner to the flow of an ancient stream.

Dudden v. Clutton Union (see p. 640) applies under the circumstances, and not *Broadbent v. Ramsbotham* (see p. 639). *Bunting v. Hicks*

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WILL—

(1.) *Construction*—"My Niece E.W."—*Wife's Grandniece*—*Legitimacy*.

Where a testator gives the residue of his property in favour of "my niece E. W.," having no niece of that name, his wife having two grandnieces E. W., one of whom is illegitimate, evidence is not admissible to show that the illegitimate grandniece was designated. *In re Fish, Ingham v. Rayner*

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(2.) — *Remoteness*—*Perpetuity*—*Residue*—*Child of Child dead at Date of Will*.

A testator directed his trustees to carry on his gravel-pits till they

WILL—*continued*.

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were worked out, and then to sell them and hold the proceeds of sale in trust for "such child or children of mine then living, and such issue living of any child or children then deceased, as shall being a son or sons attain the age of twenty-one years, or being a daughter or daughters attain that age or marry," the issue to take *per stirpes* :—

Held, that the trust for sale and the gift of the proceeds were void for remoteness; and evidence of probability as to the time within which the pits would be worked out after the testator's death is inadmissible.

See v. Audley (see p. 640) followed.

The testator gave his residuary estate upon trust to divide the income thereof "equally amongst all my children during their respective lives, and from the death of any such child whether before or after my death" to hold the *corpus* upon trust for "all or any the child or children of such child who being a son or sons attain the age of twenty-one years or being a daughter or daughters attain that age or marry" :—

Held, that the child of a child dead at the date of the will did not take.

Christopherson v. Naylor (see p. 640), *In re Chinery*, *Chinery v. Hill* (see p. 640), and *In re Musther*, *Groves v. Musther* (see p. 640), followed. *In re Wood*, *Tullett v. Colville* 495

(3.) — *Annuities*—"Clear of all deductions except Income-tax"—*Codicil*—"Free of legacy duty and every other deduction."

A testator, by his will, gave his real and residuary personal estate to trustees upon trust (*inter alia*) to pay certain annuities, including one to the plaintiff, "all the said annuities to be paid clear of all deductions whatsoever except income-tax"; and, by a codicil, directed "that every legacy and other interest as well derivable under my will or any codicil thereto shall be free of legacy duty and every other deduction" :—

Held, that the plaintiff's annuity was payable free of income-tax. *In re Buckle*, *Williams v. Marson* 72

(4.) — *Trust for Accumulation* — *Validity* — *Thellusson Act* (39 & 40 Geo. 3, c. 98).

A testator bequeathed his residuary personal estate upon trust to pay certain annuities out of the yearly income thereof. The surplus income of any year was given to charities, but with a direction that the same should be accumulated until the death of the last of the annuitants, whereupon such accumulations and the capital of the residuary personalty was to be divided equally among the charities. The annuitants had no claim to have any deficiencies of their annuities in any year made good out of the accumulations of previous years :—

Held, that as the annuitants could not have recourse to the accumulations which had been directed solely for the benefit of the residuary legatees, *i.e.*, the charities, the trust for accumulation was inoperative, and the charities were entitled to the surplus yearly income as it arose. *Harbin v. Musterman* 159

(5.) — *Estates in Settlement*—*Arrears of Rent at Testator's Death*—*Outgoings payable thereout*.

A testator by his will settled certain estates and bequeathed to each person who at his death should become entitled to the possession or the receipt of the rents and profits of any of such estates all

WILL—*continued.*

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arrears of rents and profits which at the testator's death might be due to his estate, and also all proportions of the same accruing due before but payable after his death, but so nevertheless that all outgoings properly chargeable against such arrears and proportions, and not discharged in his lifetime, should be paid out of such arrears and proportions. The Court of Appeal held that such outgoings were not confined to rates, taxes, tithes, tithe rent-charge and other outgoings (if any) recoverable by process of law as against or in respect of the hereditaments out of which the rents were derived, as Mr. Justice KEKEWICH had decided, but included agents' salaries, the cost of repairs and improvements and other wages of workmen employed on the estates, and in fact, all expenses which in the ordinary course of management would require to be made in order to maintain the estates in a fit state to earn rent or which would be proper deductions before ascertaining the net rents receivable as income. *In re Duke of Cleveland's Estate, Wolmer v. Forester* . . . 328

(6.) — *Words of Gift and Shifting Clause*—"Possession or receipt of rents and profits."

The canon of construction laid down in *Doe d. Hearle v. Hicks* (see p. 640) and *Langdale v. Briggs* (see p. 640), that an estate clearly given cannot be divested except by words as clear and unequivocal as those which created it, approved and applied.

A testatrix by her will directed that certain hereditaments thereby devised should go over in case the person for the time being "entitled to the possession or to the receipt of the rents and profits" of the said hereditaments should succeed to a certain title. A management clause provided that while and so often as the person who (but for the proviso) would have been "entitled to the possession, receipt, or enjoyment of the rents, issues, and profits" of the hereditaments should be an infant, the trustees should enter into and hold "the possession or receipt of the rents, issues, and profits" thereof, and manage the same. The trustees had a power of leasing during the minority of any person who if of full age would have been "entitled at law or in equity to the possession or to the receipt of the rents and profits" of the hereditaments:—

Held, on the construction of the whole will (several other parts of which also contained the words "possession or receipt of rents and profits," or similar words), that the shifting clause did not apply to the case of a tenant in tail in possession who while an infant succeeded to the title. *Leslie v. Rothes (Earl)* . . . 600

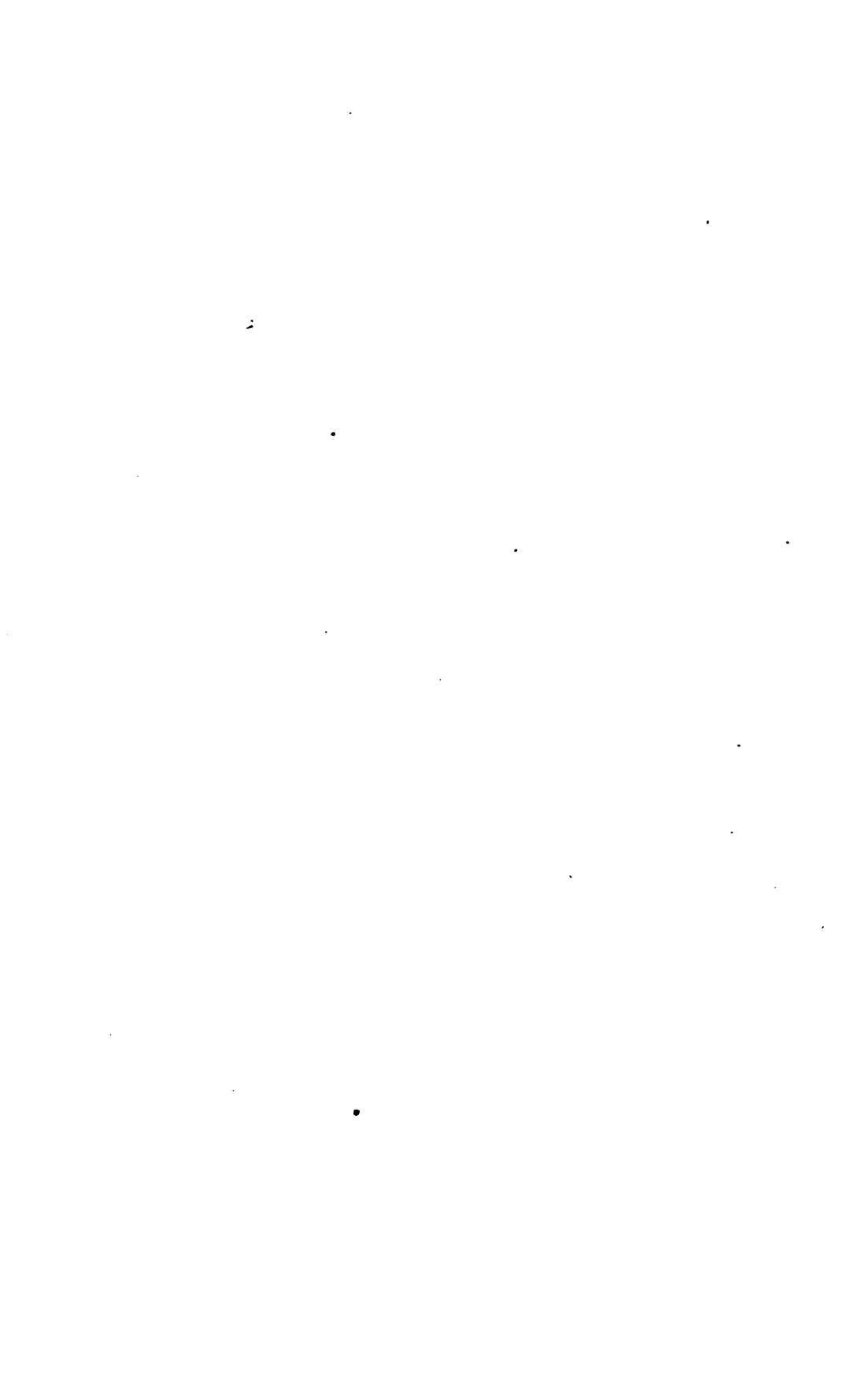
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